Supreme Court, U.S.
FILED
06-423 SEP 16 2006
OFFICE OF THE CLERK

(1)

No. 06-

IN THE

Supreme Court of the United States

DAVID J. CAUCCI, M.D.,

Petitioner,

v.

LAWRENCE MEKIC and LOUISE MEKIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

JAMES L. GRIFFITH
FOX ROTHSCHILD LLP
2000 Market Street – 10th Floor
Philadelphia, PA 19103
(215) 299-2000

Counsel for Petitioner

203531

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a summary finding of criminal contempt and imposition of a penalty as a result of a non-litigant's exercise of her First Amendment rights, outside the courtroom, violates the First Amendment to the United States Constitution's guarantee of the right to free speech and the Fourteenth Amendment to the United States Constitution's protection of the right to due process.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions at Issue	1
Statement of the Case	1
Reasons for Granting the Petition	6
A. Petitioner Was Denied The Right To Notice Of The Charges	7
B. Petitioner Was Denied The Assistance Of Counsel	8
C. Petitioner's Conduct Did Not Constitute Contempt	9
D. No Proof Exists To Support the Criminal Contempt Order	11

Contents

Page

E. Willfulness of Alleged Contempt Must Be Proven 13

F. Out of Court or "Indirect" Contempt 14

1. Criminal Contempt Is More Circumscribed In Pennsylvania 16

G. The Writ Of Certiorari Should Be Granted Because The Imposition Of The Contempt Order Was Arbitrary and Oppressive 17

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Behr v. Behr,
695 A.2d 776 (Pa. 1997) 13, 16

Burson v. Freeman,
504 U.S. 191 (1992) 12

Cliett v. Hammonds,
305 F.2d 565 (5th Cir. 1962) 7

Cooke v. United States,
267 U.S. 517 (1925) 6, 8, 14, 15, 17

Gompers v. Bucks Stove & Range Co.,
221 U.S. 418 (1911) 7, 11

Harris v. City of Philadelphia,
47 F.3d 1311 (3d Cir. 1995) 4

Harris v. United States,
382 U.S. 162 (1965) 8, 9

Hicks on behalf of Feiock v. Feiock,
485 U.S. 624 (1988) 7, 11

In the Matter of Rubin,
256 F. Supp. 874 (E.D. Pa. 1966) 12

Cited Authorities

Page

International Union, United Mine Workers of America v. Bagwell,
512 U.S. 821 (1994) 6, 15

Michaelson v. United States,
266 U.S. 42 (1924) 6, 11

Mills v. Alabama,
384 U.S. 214 (1966) 18

Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County,
544 U.S. 1301 (2005) 17

Nebraska Press Association v. Stuart,
427 U.S. 539 (1976) 18

Pennsylvania v. Local Union 542, International Union of Operating Engineers,
552 F.2d 498 (3d Cir. 1977) 13

Taberer v. Armstrong World Industries, Inc.,
954 F.2d 888 (3d Cir. 1992) 10

TWM Manufacturing Co., Inc. v. Dura Corp.,
722 F.2d 1261 (6th Cir. 1983) 13

United States v. Pozsgai,
999 F.2d 719 (3d Cir. 1993) 9, 11

Cited Authorities

Page

United States v. Thoreen,
653 F.2d 1332 (9th Cir. 1981) 10

Waste Conversion, Inc.
v. Rollins Environmental Services, Inc.,
893 A.2d 1193 (Pa. Super. 1989) 11, 13, 14

Yates v. United States,
355 U.S. 66 (1957) 15

STATE CASES

Behr v. Behr,
695 A.2d 776 (Pa. 1997) 13

Commonwealth v. Ashton,
824 A.2d 1198 (Pa. Super. 2003) 12, 15, 16, 18

Commonwealth v. Cameron,
462 A.2d 649 (Pa. 1983) 11

Commonwealth v. Garrison,
386 A.2d 971 (Pa. 1978) 9, 11, 17

Commonwealth v. Jones,
700 A.2d 1008 (Pa. Super. Ct. 1997) 9, 11-12

Commonwealth v. Martorano,
563 A.2d 1193 (Pa. Super. 1989) 12

Cited Authorities

Page

Diamond v. Diamond,
715 A.2d 1190 (Pa. Super. 1998) 12, 18

Matter of Compolongo,
435 A.2d 581 (Pa. 1981) 16

State v. Hazeltine,
143 P. 436 (Wa. 1914) 14

UNITED STATES CONSTITUTION

Amend. 1 ..... *passim*

Amend. 14 ..... i, 1, 11

RULES AND STATUTES

Federal Rule of Criminal Procedure 42 ..... 7, 9

42 Pa.C.S.A. § 4132(3) 12, 16

TABLE OF APPENDICES

Page

Appendix A — Memorandum Of Law Dated February 14, 2005 ..... 1a

Appendix B — Order Of The Court Of Common Pleas Of Lackawanna County Dated August 5, 2005 ..... 19a

Appendix C — Motion For Reconsideration Dated August 30, 2005 And Order Dated August 5, 2005 ..... 20a

Appendix D — Order Of The Superior Court Of Pennsylvania Dated December 8, 2005 ..... 24a

Appendix E — Order Of The Supreme Court Of Pennsylvania, Middle District Denying Petition For Allowance Of Appeal Dated June 22, 2006 ... 25a

OPINIONS BELOW

The Pennsylvania Supreme Court's denial of Petitioner's appeal is reported at 902 A.2d 1242 (Pa. 2006).

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

1. The First Amendment to the United States Constitution.

2. The Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner prays the United States Supreme Court will grant a Writ of Certiorari to review the Order of the Pennsylvania Supreme Court dated June 22, 2006 denying Petitioner's Petition for Allowance of Appeal.

Lawrence and Louise Mekic ("Respondents") initiated proceedings against Dr. David J. Caucci ("Petitioner") on March 28, 2001, alleging medical malpractice, in the Lackawanna County Court of Common Pleas.

On January 18, 2005, a panel of twelve jurors and two alternates were empanelled for the trial. The court instructed the panel as to the duties of jurors in general and specifically as to the duty not to discuss the trial with anyone outside the

jury room or read any materials concerning either the issues raised at trial or the parties involved. No prior instruction was given to Petitioner or to his non-party spouse during the pretrial life of the case.

That evening, January 18, 2005, the evening edition of the *Scranton Times* contained a letter to the editor written by Petitioner's wife ("Mrs. Caucci"), entitled "Malpractice Suits A Major Drawback" (the "Letter"). The Letter was submitted a week before the trial in response to an article submitted by a Scranton lawyer that, in the opinion of Mrs. Caucci, misquoted and falsely reported a well published study on medical malpractice litigation. While the Letter to the Editor discussed a recent survey on medical malpractice, it did not reference Respondents' suit against Petitioner or the issues in the case and it did not mention either Petitioner or Respondent. Mrs. Caucci is not an employee of the paper. There is no evidence in the record that Mrs. Caucci intended the Letter to impact Respondents' suit against Petitioner in any way, nor is there any evidence to suggest that it was ever seen or read by a single juror.

On January 19, 2005, Respondents moved for a mistrial on the grounds that Mrs. Caucci's letter to the editor had prejudiced the jury. Without permitting Petitioner a hearing, or the opportunity to consult with counsel, and without polling the jury to determine if, in fact, the jury had been tainted, the trial court declared a mistrial and held Petitioner in criminal contempt. Petitioner was denied essential due process protections, including notice and a hearing. There is no record evidence indicating that Petitioner had anything at all to do with, or prior knowledge of, the Letter. The trial court summarily held Petitioner in criminal contempt and entered an oral order directing him to personally pay

Respondents' attorneys' fees and costs. The court instructed Petitioner's defense counsel in the malpractice action that Petitioner's insurer could not pay the sums due under the contempt order. The court never reviewed the doctor's policy as to the insurer's policy obligation to pay counsel fees and costs assessed as a sanction.

After retaining outside counsel, Petitioner moved to strike the criminal contempt conviction. *See* Memorandum of Law in Support of Defendant's Motion to Strike the Court's February 4, 2005 Order, attached as Exhibit A. After settlement discussions convened by the judge in chambers months later, Respondents agreed to withdraw their claim for attorneys' fees. However, a similar agreement was not reached as to Respondents' costs. At that discussion in chambers, counsel for Petitioner informed Judge Corbett that Petitioner would not agree to pay the contempt assessment and wished to litigate the finding of cont mpt, but if Petitioner's insurance carrier chose to pay them, Petitioner could not stop them. The argument on the motion to strike the contempt, which required Petitioner to pay $13,286.50 in costs to Respondents, was again put off by the trial judge.

On August 5, 2005, the Honorable Trish Corbett entered the Trial Court Order without ever conducting a hearing, without any sort of record, and without otherwise affording Petitioner a chance to defend himself against any charges or creating a record of any kind. *See* Trial Court Order, attached as Exhibit B. In view of the fact that no evidence was ever elicited that the jury was aware of the letter and/or was tainted and that he was deprived of his due process right to a hearing to present evidence in his defense, Petitioner thereafter filed a Notice of Appeal from the Trial Court Order.

On February 4, 2005, the court formally entered the Contempt Order directing Petitioner to pay Respondents' trial costs. On February 14, 2005, Petitioner filed a motion to strike the Contempt Order. On August 5, 2005, the court, again without a hearing or evidence, entered the Order affirming both the Contempt Order and the award of costs in the amount of $13,286.50. On September 6, 2005, Petitioner filed a Notice of Appeal. On October 26, 2005, Respondent filed a Motion to Quash/Dismiss the Appeal. The Superior Court of Pennsylvania, again without a hearing or oral argument, issued a *Per Curiam* Order on December 8, 2005, quashing the appeal.

Petitioner moved for reconsideration; the application was denied. There was no valid finding of contempt for reasons set-forth in Petitioner's Motion for Reconsideration. *See* Motion for Reconsideration, attached as Exhibit C. Petitioner was held in contempt for something he did not do and without any prior order or notice to him. On December 22, 2005, Petitioner filed an Application for Reconsideration/Re-argument. The application was denied by the Pennsylvania Superior Court in another *Per Curiam* Order. On March 14, 2006, Petitioner filed an Application for Allowance of Appeal with the Pennsylvania Supreme Court, which was denied on June 22, 2006. The Writ of Certiorari should be granted to correct a gross violation of Petitioner's rights and the first amendment rights of his wife.

Although contempt orders are reviewed under an abuse of discretion standard, the orders will be disturbed if there existed an error of law or a clearly erroneous finding of fact. *Harris v. City of Philadelphia*, 47 F.3d 1311 (3d Cir. 1995). In this case, the lower court made serious and manifold errors of both law and fact. The court made an error of law when it

entered an order finding Petitioner guilty of criminal contempt without notice, without an opportunity to retain criminal counsel, without a hearing and without any inquiry as to Petitioner's knowledge or awareness of his wife's conduct. The court committed an error of law when it held Petitioner guilty of criminal contempt for his wife's lawful exercise of her first amendment rights. The court committed an error of law when it took no action against the billboards, letters to the editors and other publications, TV and radio announcements rampant at the time of the trial advocating against tort reform and yet chose to silence Petitioner's wife, who can no longer express her adverse opinions publicly for fear of further reprisals against her and her husband.

The court committed an error of law when it ordered the defense counsel retained to represent Petitioner in the alleged malpractice case to advise the insurance carrier that it was banned from participation and could not pay the fines imposed. That counsel was the only counsel in the room when the finding of contempt was made without any opportunity for Petitioner to speak on his own behalf. The court made an error of law in imposing criminal contempt sanctions against Petitioner for conduct not undertaken, approved, aided or abetted by Petitioner. The conduct at issue was in fact undertaken by Petitioner's wife outside the courtroom, without any intent to affect the proceedings and in furtherance of her constitutional right to address public issues.

The court made a second error of law in imposing a criminal contempt sanction in absence of any record evidence or procedural protections, thereby violating Petitioner's due process rights. The court made a third error of law in summarily imposing criminal contempt sanctions for

allegedly contemptuous acts which occurred outside the courtroom, a violation of both federal and state law.

The court made an error of fact in using as its sole justification for its outrageous conduct the fictitious contention that Petitioner admitted to harboring an intention to disrupt the judicial proceedings; Petitioner never made any such admission, and the record is utterly devoid of any suggestion that such a statement was ever made. In sum, the court's behavior in imposing criminal contempt sanctions against Petitioner for his wife's exercise of her First Amendment rights outside the courtroom is so outrageous, and constitutes such a departure from the usual and accepted course of judicial proceedings, as to call for an exercise of this Honorable Court's power of supervision.

REASONS FOR GRANTING THE PETITION

The Pennsylvania Supreme Court erred in denying Petitioner's due process rights by affirming the Pennsylvania Superior Court's deprivation of the procedural protections established under the Constitution. The presumption of innocence obtains in criminal contempt proceedings. *Michaelson v. United States*, 266 U.S. 42 (1924). The Supreme Court of the United States has long recognized that criminal contempt is a crime in the ordinary sense, and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings. Those protections include the right to notice of charges, to assistance of counsel, to summary process, and to present a defense. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994) citing *Cooke v. United States*, 267 U.S. 517 (1925). Petitioner was not afforded a single one of these rights.

A. *Petitioner Was Denied The Right To Notice Of The Charges*

Criminal contempt "may be prosecuted only on notice which states the time and place of hearing and gives a reasonable time for preparation of a defense and states the actual facts constituting the contempt charged and which describes it as such." *Cliett v. Hammonds*, 305 F.2d 565 (5th Cir. 1962), Fed. Rules Crim. Proc. Rule 42. Among the purposes the procedural protections were designed to serve is the fundamental principle that one who is charged with a crime is entitled to be informed of the nature of the charge against him. *Hicks on behalf of Feiock v. Feiock*, 485 U.S. 624 (1988) citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911). The trial court met with counsel in chambers, learned of the Letter and announced the contempt decision. Petitioner was not even present. The judge returned to the court room and announced her finding of contempt without granting any opportunity to speak to Petitioner. The court declined to take even the most elementary steps to justify its suspicions regarding Petitioner. It failed to identify a single act or omission on the part of Petitioner, either in or out of court, that could be construed as constituting criminal contempt of court. The court refused to poll the jury to determine if any juror had seen the Letter and/or was prejudiced by it.

First and foremost, in imposing the criminal contempt sanctions, the lower court failed to identify a shred of evidence that Petitioner did anything wrong. The publication, out of court, of an article authored by his wife, that neither referenced the judicial proceedings, nor Petitioner, nor Respondents, nor the Court, is the sole source of the lower court's ire. Petitioner neither assisted in the drafting of the

Letter nor procured or requested its publication. Petitioner is, to this day, in the dark as to the nature of the charge *against him*.

B. ***Petitioner Was Denied The Assistance Of Counsel***

Petitioner was also deprived of the right to assistance of counsel to defend against the charge of criminal contempt and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation, or in extenuation of the offense and in mitigation of the penalty to be imposed. *Cooke*, 267 U.S. 517. This deprivation of Petitioner's rights was made especially egregious by the fact that, in cases where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on guilt or the penalty to be imposed, the court cannot exclude evidence in mitigation, as it did in this instance. *Id.* Nothing in the record suggests that either Petitioner or Mrs. Caucci acted with the intent to disrupt proceedings. Submitting a letter to an editor to correct perceived false information is protected free speech. Likewise there is no assurance that the letter will be selected for publication. It is public knowledge that tort reform has been a public issue in Pennsylvania in the years prior to the facts in question. Every citizen who must vote on such issues is entitled to speak about them. Petitioner had a right to explore the issue of the court's violation of First Amendment rights in his defense and to prevent the contempt order which in reality is a "gag" order against his wife.

A party must be represented by counsel and have the opportunity to purge himself of contempt. *Harris v. United States*, 382 U.S. 162 (1965). Both Petitioner's personal and professional reputation have suffered as a result of the court's

baseless actions which have been widely publicized in upstate Pennsylvania. Recognizing the potential for such harm, and seeking to prevent it, the Third Circuit has held that criminal contempt proceedings must comport with Federal Rule of Criminal Procedure 42(b), which requires such proceedings to be "prosecuted on notice . . . stat[ing] the time and place of hearing, allow[ing] a reasonable time for the preparation of the defense . . . stat[ing] the essential facts constituting the criminal contempt, and describing it at as such." *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993).

The process afforded Petitioner served to deny him every one of these rights, and in lieu of such rights, the court declared its decision and deprived him of a hearing where he could be represented by counsel and afforded the opportunity to mount any defense against the charges. Summary disposition is permitted only in exceptional circumstances, where necessary to achieve vindication of a court's dignity and authority. *Harris*, 382 U.S. 162. Nothing in the record suggests that any exceptional circumstances existed to warrant the summary imposition of the Contempt Order.

C. *Petitioner's Conduct Did Not Constitute Contempt*

One of the most basic failings of the lower court was the failure to establish that any action or inaction on the part of Petitioner in fact constituted criminal contempt. Pennsylvania courts require significant disruptions of the orderly judicial process for a finding of contempt. *Commonwealth v. Jones*, 700 A.2d 1008 (Pa. Super. Ct. 1997). A significant disruption has been defined as one posing actual, imminent prejudice to a fair proceeding or to preservation of the court's authority. *Commonwealth v. Garrison*, 386 A.2d 971 (Pa. 1978). This

danger must not be remote or even probable; it must immediately imperil the participants in the courtroom. In the instant case, the conduct at issue was that of Mrs. Caucci, was taken outside of the courtroom in the exercise of her First Amendment right to free speech, and did not address either the parties or the facts of the case. There is nothing to indicate that the publication of the Letter posed any actual, imminent threat or prejudice to the judicial proceedings, so as to justify the imposition of a Contempt Order, let alone a summary finding of criminal contempt without the procedural safeguards required by law.

The propriety of imposing criminal contempt sanctions depends upon whether punishment is necessary to vindicate the court's authority. *Taberer v. Armstrong World Industries, Inc.*, 954 F.2d 888 (3d Cir. 1992). The seriousness of the misbehavior has some bearing on whether conduct is materially obstructive so as to constitute criminal contempt, and mere disrespect, insult or affront to a court's sense of dignity are insufficient. *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981).

There is no suggestion anywhere in the record that any action or inaction on the part of Petitioner served to undermine the court's dignity or authority. Both Petitioner and Mrs. Caucci are unfamiliar with the legal process. No order was ever published by the court banning letters or discussion of the case. Indeed, there *could not be* such prior restraint. They did not violate the authority of the court.

Even assuming *arguendo* that the lower court could defend a claim that the Letter could in fact sully the dignity or authority of the court, Judge Corbett, despite a request to do so, did not trouble to poll the jury to inquire as to whether

a single juror had even read the Letter at issue. No evidence suggests that any juror read the Letter or was impacted by it in any way. Remarks that are injudicious, or even disrespectful, will not justify a summary conviction for criminal contempt of court. *Commonwealth v. Garrison*, 386 A.2d 971 (Pa. 1978). Petitioner said nothing. Summary imposition of the criminal contempt charge without notice, assistance of counsel, record evidence, or any opportunity to defend against the charge clearly violated Petitioner's constitutional rights. The court's *summary imposition* of the Contempt Order on the strength of facts that could not even establish that criminal contempt was ever committed is insupportable.

D. *No Proof Exists To Support the Criminal Contempt Order*

Criminal contempt penalties may not be imposed on someone who has not been afforded the Constitutional protections applicable to criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt. U.S.C.A. Const. Amend. 14; *Gompers*, 221 U.S. 418; *Michaelson*, 266 U.S. 42; *Hicks*, 485 U.S. 624; *Pozsgai*, 999 F.2d 719; *Waste Conversion, Inc. v. Rollins Environmental Services, Inc.*, 893 F.2d 605 (3d Cir. 1990); *Commonwealth v. Cameron*, 501 Pa. 572, 462 A.2d 649 (Pa. 1983).

To sustain a criminal contempt conviction under the statutory provision governing misbehavior obstructing administration of justice, proof beyond a reasonable doubt of the following elements must be present: misconduct, in the presence of the court, committed with the intent to obstruct proceedings, which obstructs the administration of justice. *Commonwealth v. Jones*, 700 A.2d 1008 (Pa. Super.

Ct. 1997); *Commonwealth v. Martorano*, 563 A.2d 1193 (Pa. Super. 1989); 42 Pa.C.S.A. 4132(3). In a criminal contempt proceeding, four elements must be proven beyond a reasonable doubt: (1) the order must be definite, clear, specific and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct prohibited; (2) the contemnor must have had notice of the specific order or decree; (3) the act constituting the violation must have been volitional, and (4) the contemnor must have acted with wrongful intent. *Diamond v. Diamond*, 715 A.2d 1190 (Pa. Super. 1998).

There must be record evidence to establish each of the four elements, "suspicions are not enough to hold someone in contempt of court." *In re Rubin*, 256 F. Supp. 874 (E.D. Pa. 1966), *rev'd, in part, on other grounds*, 378 F.2d 104 (3d Cir. 1967). Additionally, the burden is higher where, as in the instant case, the Order infringes upon First Amendment protections as well as due process rights. The Pennsylvania Superior Court has held that state action infringing upon political speech is subject to strict scrutiny, upheld only where the regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. 2003) *See also Burson v. Freeman*, 504 U.S. 191, 197 (1992).

Similarly, there is no evidence that Petitioner ever acknowledged any intention to affect the judicial proceedings by means of the Letter, for the simple reason that no such evidence exists. The trial court referenced this imagined acknowledgment in issuing its Contempt Order; this acknowledgment was made out of whole cloth and certainly cannot serve to justify imposition of the Order.

E. *Willfulness of Alleged Contempt Must Be Proven*

One of the elements that must be proven beyond a reasonable doubt is the willfulness with which the criminal contempt was undertaken. Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt, as to most other crimes. "Willfulness," for purposes of assessing disobedience in the criminal contempt context, implies deliberate or intended violation, as distinguished from accidental, inadvertent, or negligent violation." *TWM Manufacturing Co., Inc. v. Dura Corp.*, 722 F.2d 1261 (6th Cir. 1983). In the instant case, no record evidence exists to support a charge that either Petitioner or Mrs. Caucci willfully committed any violation or disrupted judicial proceedings in any way.

All facts in conviction of criminal contempt of court must be proven beyond reasonable doubt. *Behr v. Behr*, 695 A.2d 776 (Pa. 1997). The element of willfulness is an essential component of criminal contempt and distinguishes civil from criminal contempt. *Waste Conversion, Inc.*, 893 F.2d 605; *Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 552 F.2d 498, 510 (3d Cir. 1977). The mere failure to comply with a court's order, without more, is not sufficient to sustain a conviction for contempt because "the crime of criminal contempt requires a specific intent to consciously disregard an order of the court." *Id.* In the first instance, there is no Order from the Court in this case before the finding of contempt. Secondly, there is nothing in the record to suggest that Petitioner held a specific intent to engage in criminal contempt; indeed there is nothing to suggest that Petitioner had any specific intent to engage in any form of contempt, and thirdly, *there is no conduct by the Petitioner.*

In a contempt proceeding based on the alleged violation of an order of the court directed against the publication of comments reflecting upon the cause of action or defense of a criminal prosecution then before the court, when a reasonable doubt, either in fact or law, exists in a criminal or quasi criminal case, that doubt must be resolved in favor of the accused. *Waste Conversion, Inc. v.* 893 F.2d 605 citing *State v. Hazeltine*, 143 P. 436 (Wa. 1914). The abundance of reasonable doubt regarding the justification for and propriety of the Contempt Order must be resolved in favor of Petitioner.

F. ***Out of Court or "Indirect" Contempt***

The deprivation of all lawful procedural protections was compounded in this case by the fact that the alleged contempt occurred outside the courtroom. Where, as here, the alleged contempt at issue occurs out of court, further procedural protections are afforded. The historical underpinnings of this principle demonstrate the fundamental nature of the judicial principle involved. As stated in *Cooke*, "punishment without trial was so contrary to the usual and ordinarily indispensable hearing before judgment constituting due process that the assumption that the court saw everything that went on in open court was required to justify the exception; but the need for immediate penal justification of the dignity of the court created it. When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument." *Id.* at 395.

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or

explanation. In those cases, the considerations justifying expedited procedures do not pertain. Summary adjudication of indirect contempt, of the kind imposed by Judge Corbett, is prohibited, and criminal contempt sanctions are entitled to full criminal process. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 citing *Cooke*, *supra*.

> A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Yates v. United States, 355 U.S. 66 (1957).

Contempt involving out of court disobedience often requires elaborate and reliable factfinding. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). For example, a "colloquy at which the contemnor may argue his . . . position is not sufficient to satisfy the strict procedural due process requirements that apply prior to a conviction for indirect criminal contempt." *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. 2003). Alleged contempt committed beyond the court's presence where the judge has no personal knowledge of the material facts are considered especially suited for trial by jury. *Id.* A hearing must be held, witnesses must be called, and evidence taken in any event. Such contempt does not obstruct the court's ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial. *Id.* Under these circumstances, criminal procedural protections such as the rights to counsel and proof

beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power. *Id.* Not even the most basic protections required by law were afforded Petitioner, let alone the heightened protections accorded where the contempt alleged occurred out of court.

1. *Criminal Contempt Is More Circumscribed In Pennsylvania*

In 1978, the Pennsylvania Legislature specifically limited the courts' contempt powers, by Section 4132 of the Judicial Code, 42 Pa.C.S. § 4132. That statute circumscribed the power of the several courts of the Commonwealth to issue attachments and to impose summary punishments for contempt of court to the following cases: (1) the official misconduct of officers of such courts respectively; (2) disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court; (3) the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice. None of these cases is apposite to the instant case; therefore, summary imposition of the criminal contempt order was not justified by fact or law.

The Pennsylvania Supreme Court acknowledged this limitation in *Matter of Compolongo*, stating: "Although the law has long recognized the inherent power of the courts to impose summary punishment for contemptuous misconduct, that power has been limited in this Commonwealth by Section 4132." 435 A.2d 581, 583 (1981) citing *Behr v. Behr*, 695 A.2d 776 (Pa. 1997). The Contempt Order contravenes the clear intention of the Pennsylvania legislature to limit the imposition of the penalty to circumstances not present in the instant case.

G. *The Writ Of Certiorari Should Be Granted Because The Imposition Of The Contempt Order Was Arbitrary and Oppressive*

Exercise of the power of contempt is "a delicate one, and care is needed to avoid arbitrary or oppressive conclusions." *Cooke v. United States*, 267 U.S. 571 (1925). A court should not wield the criminal contempt sanction when less drastic measures will suffice. *Commonwealth v. Garrison*, 478 Pa 356, 386 A.2d 971 (1978). In the instant case, summary imposition of the contempt order on the basis of conduct undertaken by Petitioner's wife is precisely the type of abusive and oppressive order the courts and legislature have attempted to avoid through case law and legislation. Implicit in the opinions and legislation is the recognition that informal procedures undertaken by officials and designed to chill expression can constitute a prior restraint on speech. *Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County*, 544 U.S. 1301 (2005). A threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability. *Id.* Similarly, the threat of specific speech resulting in criminal sanctions without procedural protections would chill speech. An order not accompanied by notice, or a hearing, or any other of the necessary and usual safeguards of the judicial process bears many of the marks of a prior restraint. *Id.* at 1626.

In addition to the concern for First Amendment rights, courts guard the right to be free from spurious criminal charges, recognizing the harm such charges can impose. The right of a citizen "to be free of the stigma of an unfair or unfounded criminal conviction is a hallmark of American

jurisprudence; thus the right to be free from the taint of such a conviction is too important." *Diamond*, 715 A.2d at 1195. All citizens have the right to engage in political speech and to persuade their fellow citizens on matters of pending legislation and political action without fear of criminal prosecution and summary adjudication without procedural protections. *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. 2003) *See Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (noting universal agreement that a major purpose of the First Amendment was to protect political speech). "The Constitution specifically selected the press, which includes . . . newspapers, to play an important role in the discussion of public affairs." *Id.* at 219.

Similarly, the Supreme Court has held that gag orders, issued to protect the fairness of trial, are prior restraints on speech and, therefore, unconstitutional. *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. 2003); *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976). The Contempt Order at issue in this case served as a gag order, prohibiting some ill-defined category of speech indefinitely, at the risk of criminal sanctions.

CONCLUSION

Through deprivation of notice, assistance of counsel, or record evidence of contempt to sustain the burden of proof, Petitioner was denied all opportunity to defend against the charges of criminal contempt summarily imposed by the trial court, which Order was wrongly sustained by the Pennsylvania Supreme Court. If such conduct on the part of the trial court is left unchecked, the effect could surely be to exercise a chilling effect on the free speech of persons associated with parties to litigation, in clear violation of the United States Constitution. This Honorable Court's intervention, to serve as a check to the unrestrained and unprincipled exercise of the trial court's order is required.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES L. GRIFFITH
FOX ROTHSCHILD LLP
2000 Market Street – 10th Floor
Philadelphia, PA 19103
(215) 299-2000

Counsel for Petitioner

APPENDIX

APPENDIX A — MEMORANDUM OF LAW DATED FEBRUARY 14, 2005

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY

CIVIL ACTION — LAW

NO. 1661-CIVIL-2001

LAWRENCE F. MEKIC and LOUISE MEKIC,

Plaintiffs,

vs.

DAVID J. CAUCCI, M.D.,

Defendant.

I. MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE THE COURT'S FEBRUARY 4, 2005 ORDER

II. MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR RECUSAL

Defendant, David J. Caucci, M.D., by and through his attorneys, Fox Rothschild LLP, hereby submits this memorandum of law in support of his Motion to Strike The Court's February 4, 2005 Order and in support of his Motion for Recusal.

Appendix A

A. FACTS AND PROCEDURAL HISTORY

On March 28, 2001, Plaintiffs commenced a medical malpractice action against David J. Caucci, M.D. ("Dr. Caucci") by writ of summons.[1] On January 18, 2005, a panel of twelve jurors and two alternates was selected and sworn in by the Court. The panel was instructed as to their duties as jurors, specifically their responsibility not to discuss the matter with anyone or to read anything relevant to the issues or parties involved.

That night, in the evening edition of the *Scranton Times*, an editorial was published, titled "*Malpractice Suits a Major Drawback*" (the "editorial"). The editorial was written by Elizabeth Caucci ("Mrs. Caucci"), Dr. Caucci's wife, in her capacity as Clarks Summit President of the Lackawanna County Medical Society Alliance.[2] Although advocating tort reform in the Commonwealth, Mrs. Caucci's editorial did not refer to this lawsuit or to the parties involved. Rather, the editorial responded to a recent article, published by the

---

1. This memorandum of law, Defendant's Motion to Strike This Court's February 4, 2005 Order, and Defendant's Motion for Recusal are concerned solely with the Court's February 4, 2005 Order and with the Court's further participation in these proceedings; the underlying medical malpractice action and the issues raised therein are irrelevant to the issues at hand and, therefore, they are not addressed.

2. As Clarks Summit President of the Lackawanna County Medical Society Alliance, Mrs. Caucci regularly advocates the position of the medical community through the media. She has written numerous editorials on the subject of tort reform that have been published in the *Scranton Times*.

Scranton Times, in which Scranton attorney David Falk erroneously commented on a survey, conducted by the Keiser Family Foundation and the Harvard School of Public Health, concerning public perception of the importance of health care reform (the "Falk article"). Mrs. Caucci submitted her response to the *Scranton Times* approximately one week earlier and had no influence over when, or if, the article would be published. It was her intent to voice her opinion and the viewpoint of the Lackawanna County Medical Society Alliance as to certain general legislative proposals and to correct the misquotes in the Falk article. She did not intend to taint the jury selected in this case or to influence the outcome of trial and there is no proof to the contrary.[3]

The next day, on January 19, 2005, Plaintiffs' counsel presented the editorial to the Court, requesting default judgment or, in the alternative, a mistrial and payment of his attorneys' fees. While counsel did not complain about the Falk article, which favored his position and which appeared only days before the trial, he argued that Mrs. Caucci's editorial was a deliberate attempt to taint the jury and influence the outcome of trial. Dr. Caucci's attorney, John T. McGrath, Esquire ("Mr. McGrath"), asked the Court to poll

3. The Court's Order states, "Defendant, while not denying that the jury pool was tainted," *February 4, 2005 Memorandum and Order*, at p. 3, "Defendant did not deny that the published letter was meant to taint the jury," *Id.* at 5, "Defendant admitted the letter, at least in part, was designed to taint the jury," *Id.* at p. 6, and "it was admitted that the purpose of the letter was, at least in part, to taint the jury." *Id.* At all times, Dr. and Mrs. Caucci have denied this assertion and there is no evidence on the record that they ever made such an admission. The Court's statements in this regard are, thus, erroneous.

the jury to determine whether, in fact, any juror had read or discussed the editorial. Without polling the jury, which consisted of twelve jurors and two alternates, and absent any testimony regarding Mrs. Caucci's intent in submitting the editorial, the Court orally granted Plaintiffs' motion, declaring a mistrial and ordering Dr. Caucci to personally pay Plaintiffs' trial fees and costs. On February 4, 2005, the Court entered a Memorandum and Order, setting forth the grounds for its decision, formally declaring a mistrial[4] and ordering Dr. Caucci to personally pay Plaintiffs' trial fees and costs (the "Order").

B. ARGUMENT IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE THE COURT'S FEBRUARY 4, 2005 ORDER

In its Order, *the* Court relied on *Carter v. U.S. Steel Corp.*, 604 A.2d 1010 (Pa. 1992), to support its conclusion that Mrs. Caucci's editorial "was reasonably likely to cause prejudice." *February 4, 2005 Memorandum and Order*, at p. 5. As a result, the Court declared a mistrial and ordered Dr. Caucci to personally pay Plaintiffs' attorneys' fees. There was no evidence, however, that the jury was, in fact, exposed to the editorial. The Court's conclusion that the editorial was prejudicial, which provides the foundation for its subsequent Order, is, therefore, erroneous.

---

4. This memorandum of law, Defendant's Motion to Strike This Court's February 4, 2005 Order, and Defendant's Motion for Recusal do not address the grant of a mistrial; Dr. Caucci seeks to strike only the aspects of this Court's order concerning attorneys' fees and for the Court to recuse herself from any further proceedings.

Moreover, the sanction, an award of Plaintiffs' attorneys' fees, was based on the Court's finding that the editorial was written "without reasonable or probable cause or excuse" and that it was intended to harass and annoy Plaintiffs. *See February 4, 2005 Memorandum and Order*, at p. 5. The Court reached this conclusion without any evidence regarding Mrs. Caucci's intentions and despite the editorial having been written for a proper purpose, unrelated to the instant malpractice action. The Court's conclusion that the elements of 42 Pa.C.S.A. § 2503(7) were met by the publication of the editorial was, therefore, speculation and an abuse of discretion.

Additionally, because the Order sanctions Dr. Caucci, ordering him to personally pay Plaintiffs' attorneys' fees, the Order is a conviction of indirect criminal contempt. *See Diamond v. Diamond*, 715 A.2d 1190, 1194 (Pa. Super. 1998)(discussing distinctions between contempt, generally). Dr. Caucci, however, was not afforded the procedural due process safeguards attendant to such a conviction. *See Id.* at 1196, n. 10 (concerning due process safeguards). Moreover, he was convicted on the basis of actions that were not his own and which are not attributable to him, and which, even if attributable to him, fail to rise to the level necessary to sustain such a conviction. *See id.* at 1196 (noting burden of proof and elements of contempt). Thus, his conviction cannot stand.

Finally, the Court's Order was issued solely in response to the publication of the editorial, a form of speech. The Order was directed at the content of the speech and acts, in effect, as a retroactive gag order on speech concerning a broad range

of important political issues. The Order is, thus, unconstitutional as it infringes upon the protections guaranteed by the First Amendment.

For these reasons, Dr. Caucci respectfully requests that the Court rescind its February 4, 2005 Order to the extent it orders him to pay Plaintiffs' attorneys' fees.[5]

1. Absent evidence that the jury was actually exposed to the allegedly prejudicial publication, the Court's conclusion that the editorial was prejudicial, which forms the basis for its subsequent Order, was erroneous.

The Order was based upon the Court's conclusion that the editorial was "reasonably likely to cause prejudice." *February 4, 2005 Memorandum and Order*, at p. 5. This conclusion, however, was erroneous absent proof that the jury, in fact, read and/or discussed the publication. *Carter*, mistakenly relied upon by the Court in its Order, supports this conclusion.

In *Carter*, a newspaper article and television news broadcast, discussing the personal injury action under consideration, were published during jury deliberations, 604 A.2d at 1012. 13. After the jury returned its verdict, the trial court interviewed each juror individually, inquiring into whether the juror had read the article and/or viewed the broadcast and, if so, what influence the publications had on their decision-making. *Id.* at 1013. This inquiry revealed that,

5. It is clearly too late to contest the mistrial and, therefore, Dr. Caucci does not seek relief from the Court in this regard.

while none of the jurors had read the article, two of the jurors had seen the broadcast and discussed it during deliberations, *Id.* On the basis of this testimony, the trial court vacated the jury's verdict and ordered a new trial. *Id.* at 1012.

On appeal, the Supreme Court of Pennsylvania held that "testimony as to the subjective reasoning processes of the jurors is inadmissible," but that testimony concerning the jurors' overt conduct, i.e. whether they read the article or viewed the broadcast, was properly admitted. *Id.* at 1014-15. Thus, the Court recognized a narrow exception to the "no impeachment rule," permitting a juror to "testify only as to the *existence of the outside influence*, but not as to the effect this outside influence may have had on the deliberations." *Id.* at 1013 (*citing Commonwealth v. Zlatovich*, 269 A.2d 469 (Pa. 1970)(emphasis added). In accordance with this reasoning, the Court stated, "[O]nce the existence of a potentially prejudicial extraneous influence has been *established by competent testimony*, the trial judge must assess the prejudicial effect of such influence." *Id.* at 1016 (emphasis added). Thus, proof that a jury is actually exposed to an allegedly prejudicial publication is a prerequisite for finding that the jury was tainted and for any subsequent remedial action. *See id.*; *see also Pratt v. St. Christopher's Hospital*, 2005 WL 121552, *1 (Pa.) and *Rohm & Haas Co. v. Continental Casualty Co.*, 2002 WL 434617, *1 (Pa. Com. Pl.)(involving actual evidence of jury's exposure to alleged taint). In other words, for a court to conclude that a jury has been tainted, the evidence must not only establish that the allegedly prejudicial publication exists, but also that it exists as an "outside influence," which requires that the jury actually be exposed to the publication. *See Carter*, 604 A.2d at 1016.

Appendix A

During the January 19, 2005 hearing, Mr. McGrath asked the Court to poll the jury to see if, in fact, they had been tainted by the publication of the editorial. *See Transcript of January 19, 2005 Hearing*, at p. 7-8. With two alternates, and a panel of twelve jurors, there was ample opportunity to eliminate any juror that confessed to being influenced. Without polling the jury and without any evidence that the jury had actually been exposed to the editorial, other than mere conjecture, the Court erroneously entered the Order. *See Transcript of January 19, 2005 Hearing*, at pp. 7-10. The Court misreads *Carter*, ignoring the Supreme Court's requirement that the allegedly prejudicial publication must be shown as an actual outside influence over the jury. *See February 4. 2005 Memorandum and Order*, at pp. 4-5. The Court infers from the mere existence of the editorial that the jury has been exposed to it and prejudiced by it, despite the fact that the editorial appeared only after the Court instructed the jury not to read anything relevant to the case. Accordingly, because the Court's Order is based on its misreading of *Carter* and its conclusion that the jury was tainted, the Order is erroneous. Dr, Caucci, therefore, respectfully requests that the Court rescind its February 4, 2005 Order to the extent it orders him to pay Plaintiffs' attorneys' fees.

2. The editorial was written for a proper purpose, unrelated to the malpractice action, and, therefore, the Court's conclusion that it was vexatious was an abuse of its discretion.

The Court awarded Plaintiffs' attorneys' fees on the basis of its assumptions that the editorial was written "without reasonable or probable cause or excuse" and that it was intended to harass and annoy Plaintiffs. *See February 4, 2005 Memorandum and Order*, at p. 5. This conclusion, however, in the absence of any evidentiary basis, was an abuse of discretion as there was no evidence indicating that the editorial was written for an improper purpose and, in fact, the editorial was unrelated to the pendency of the malpractice litigation.

In American jurisprudence, the general rule is that a party to litigation is responsible for its own counsel fees and costs, absent, among other exceptions, statutory authority. *See Cher-Rob, Inc. v. Art Monument Co.*, 594 A.2d 362, 363 (Pa. Super. 1991). Pursuant to 42 Pa.C.S.A. § 2503(7), however, a party may be "awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." This statute is interpreted narrowly using "strict definitional guidelines," so as not to punish the innocent. *See Thunburg v. Strause*, 682 A.2d 295, 300 (Pa. 1996). A party is said to act "vexatiously" when it acts "without sufficient grounds in either law or in fact" or with "the sole purpose of causing annoyance." *Id.* at 299. Only acts that relate to the "pendency of an action" may give rise to an award of attorneys' fees under 42 Pa.C.S.A. § 2503(7). *See Cher-Rob*, 594 A.2d at

364. The party seeking counsel fees bears the burden to prove its entitlement to such fees under one of the statutory exceptions. *See Berg v. Georgetown Builders, inc.*, 822 A.2d 810, 816 (Pa. Super. 2003).

Initially, it must be noted that the Court's award of attorneys' fees is inappropriate because Mrs. Caucci was not, and is not, a party to this litigation. In addition, in its Order, the Court concludes, "[t]here is no doubt that the content of the letter published in a newspaper whose general circulation is primarily it Lackawanna County on the evening of the first day of trial by the Defendant's wife was vexatious. This is especially true in light of the fact that the Defendant was aware that the letter could taint the jury and was fully aware that its content addressed issues which would be decided at trial," *February 4. 2005 Memorandum and Order*, at p. 5. It reached this conclusion despite the absence of any evidence indicating either that Dr. or Mrs. Caucci intended to annoy or harass the Plaintiffs or that the editorial was directed at the Plaintiffs and the instant malpractice action. Moreover, the Court concluded that the editorial was vexatious when, in fact, there was a proper purpose for the article, unrelated to the malpractice litigation. That is, Mrs. Caucci regularly contributes editorials to the *Scranton Times* in her capacity as Clarks Summit President of the Lackawanna County Medical Society Alliance and the editorial at issue was intended as a response to misstatements contained in the Falk article. Finally, the Court erroneously relied upon the editorial as the basis of an award of attorneys' fees under 42 Pa.C.S.A. § 2503(7) despite the fact that the editorial was unrelated to the pendency of the malpractice litigation and was not written by any party to the case. That is, the editorial was neither a

pleading, nor a discovery request that would vex Plaintiffs, causing them to expend legal resources in response; rather, it was a newspaper submission relevant to the public discourse on the issue of tort reform, which required no response in this litigation. For these reasons, the editorial was not vexatious and, because there is no evidence to support such an assumption, the award of attorneys' fees cannot stand. Accordingly, Dr. Caucci respectfully requests that the Court strike its Order to the extent it impermissibly awards Plaintiffs' attorneys' fees as a sanction for publication of the editorial.

3. The Order convicts Dr. Caucci of indirect criminal contempt, however, be was not afforded the procedural due process safeguards attendant to such a conviction.

The Order, which describes Dr. and Mrs, Caucci's actions as "calculating and contemptuous," *February 4. 2005 Memorandum and Order*, at p. 6, imposes an unconditional fine on Dr. Caucci in the form of Plaintiffs' attorneys' fees. The Order evidences the Court's intent to punish Dr. Caucci for his wife's publication of the editorial and, therefore, it is a finding of indirect criminal contempt. Such a conviction requires that certain procedural safeguards be followed and, because all of these safeguards were omitted, Dr. Caucci's conviction cannot stand.

The distinction between criminal and civil contempt rests on whether the dominant purpose of the sanction is coercion or punishment. *See In re Martorano*, 346 A.2d 22, 28 (Pa. 1975). "A civil adjudication of contempt coerces with a

conditional or indeterminate sentence of which the contemnor may relieve himself by obeying the court's order, while a criminal adjudication of contempt punishes with a certain term of imprisonment or fine which the contemnor is powerless to escape by compliance." *Id.* (*citing Shillitani v. United States*, 384 U.S. 364, 368-70 (1966)). Simply put, "in a civil contempt order[,] the contemnor is able to purge himself of the contempt by future conduct and[,] thus[,] holds the keys to the jailhouse door." *Diamond v. Diamond*, 715 A.2d 1190, 1194 (Pa. Super. 1998)(citing *Colbert v. Gunning*, 533 A.2d 471, 472 (Pa. Super. 1987)). In a criminal contempt, on the other hand, punishment is both "certain and beyond the (contemner's] power to escape." *Id.* The Order awarding Plaintiffs' attorneys' fees was both unconditional and beyond Dr. Caucci's power to escape through future conduct; its dominant purpose was to punish Dr. Caucci for the publication of the editorial. The contempt is, therefore, properly classified as criminal.

Whether a criminal contempt is direct or indirect depends on where the alleged contemptuous act occurred. See *Commonwealth v. Ashton*, 824 A.2d 1198, 1202-03 (Pa, Super. 2003). "A charge of indirect criminal contempt consists of a claim that a violation of an order or decree of court occurred outside the presence of the court." *Id.* at 1203 *(citing Commonwealth v. Baker*, 722 A.2d 718, 720 (Pa. Super. 1998)). A direct criminal contempt, on the other hand, concerns a "misbehavior that takes place in the presence of the court, thereby obstructing the administration of justice." *Id.* at 1202. The alleged contemptuous act, in this case, was Mrs. Caucci's writing the editorial and submitting it to the *Scranton Times for* publication a week before the trial, an

act taking place outside the presence of the court and before the start of trial. There was no outstanding Order of the Court, however, directed at Mrs. Caucci, a non-party. This Court's Order, then, is one of indirect criminal contempt, but directed against the wrong party and without a prior Order; there was no conduct in violation of a court order and, thus, no contempt was committed.

The civil-criminal, direct-indirect distinctions "exist solely for determination of a contemnor's procedural rights and a court's sentencing options." *Martorano*, 346 A.2d at 29. "Quite simply, a contemnor who will be sentenced to . . . a fixed fine, which he is powerless to escape by purging himself of his contempt, is entitled to the essential procedural safeguards that attend criminal proceedings generally." Id. "With regard to indirect criminal contempt, these procedural safeguards include: . . . the right to be notified of the specific accusations against him . . . , a reasonable time to prepare a defense, the assistance of counsel, and the right, upon demand, to a speedy and public trial before a jury." *Ashton*, 824 A.2d at 1203. "A colloquy at which the contemnor may argue his ... position is not sufficient to satisfy the strict procedural due process requirements that apply prior to a conviction for indirect criminal contempt." *Id.* At the January 19, 2005 hearing, wherein the oral order of contempt was issued, the Court failed to afford Dr, Caucci reasonable notice of the charge against him, a reasonable time to prepare a defense, the opportunity to obtain separate counsel conversant in criminal matters, and the opportunity to request a jury trial. The colloquy of counsel that took place during that hearing was insufficient, as a matter of law, to sustain Dr. Caucei's conviction for indirect criminal contempt.

Furthermore, the Court advised Mr. McGrath, the defense counsel retained by Dr. Caucci's insurance company, that the company could not pay the fine and, in effect, terminated counsel's representation of Dr. Caucci. At no time did the Court put any questions to Dr, Caucci or his defense counsel as to Dr. Caucci's alleged intent to taint the jury so that he could deny the allegation. In the absence of questions or the opportunity for a hearing, no response was permitted to him, Moreover, the Court's demeanor precluded any opportunity for Dr. Caucci to retain defense counsel and appropriately respond. His silence, under the circumstances, is not an admission of wrongdoing, especially in light of the 5th Amendment's protection of a defendant's right to silence, *See* U.S. CONST. AMEND. V. The Court's statements to the contrary are, thus, improper.[6]

Dr. Caucci, therefore, respectfully requests that this Court rescind its Order to the extent it holds Dr. Caucci in indirect criminal contempt by ordering him to pay Plaintiffs' attorneys' fees.

4. Dr. Caucci was convicted on the basis of actions that were not his own and which, even if attributed to him, do not rise to the level necessary to sustain an indirect criminal contempt conviction.

It is axiomatic that guilt, in the criminal sense, is personal. In this regard, a person cannot be convicted of a crime on the basis of another's conduct, without more. The sole basis for the Court's Order, however, was the editorial

6. *See* Note 3.

written and submitted by Mrs. Caucci; there was no evidence introduced that Dr. Caucci wrote the editorial or caused its publication. In addition, Mrs. Caucci was not a party to the malpractice action; rather, Dr. Caucci was defending the case solely in his professional capacity. Accordingly, and in light of the absence of a prior order violated by either Dr. or Mrs. Caucci, the Order was improper. Dr. Caucci respectfully requests, therefore, that the Order be stricken.

To the extent that the editorial can be attributed to Dr. Caucci, which is denied, the editorial, without more, does not rise to the level of culpability necessary to sustain an indirect criminal contempt conviction. To support such a finding, the evidence must demonstrate beyond a reasonable doubt that Dr. Caucci's conduct was criminal. *See Diamond*, 715 A.2d at 1196. In the first instance, there was no outstanding order that would have prohibited Mrs. Caucci's submission of the editorial. To the extent that the publication of the editorial can be seen as violating the Court's general instructions regarding trial, however, such publication does not rise to the level of culpability necessary to convict Dr. Caucci of indirect criminal contempt for two reasons.

First, the article was written and submitted before the Court had issued any instructions and Mrs. Caucci was never informed of such instructions as she was not a party to the case. Her submission of the editorial, therefore, did not violate any court order. Second, "[f]our elements must be present to support a finding of criminal contempt for failure to comply with a court order: (1) the order must be definite, clear, specific and leave no doubt or uncertainty in the mind of the person to whom it was addressed of the conduct

prohibited; (2) the contemnor must have had notice of the specific order or decree; (3) the act constituting the violation must have been volitional, and (4) the contemnor must have acted with wrongful intent." *Id.* It must be also proven "that the alleged contemnor's failure to comply with the order was willful or at least reckless." *Id.* Clearly, no evidence to support any of these elements was adduced at the January 19, 2005 hearing, as no testimony was taken. Moreover, these standards were never met in light of the following: (1) there was no clear and uncertain order prohibiting publication of the editorial, (2) Dr. Caucci did not write the editorial or cause its publication, and (3) there was no evidence to suggest that either Dr. or Mrs. Caucci acted willfully or recklessly or with an improper intent. Thus, the evidence before the Court was insufficient, as a matter of law, to support Dr. Caucci's conviction of indirect criminal contempt.

5. The First Amendment protects the editorial that prompted the Court's Order.

The Constitution of the United States and that of the Commonwealth of Pennsylvania specifically guarantee the freedom of speech. *See* U.S. CONST. amend. I and PA. CONST. art. I, § 7. All citizens have the right to engage in political speech and to persuade their fellow citizens on matters of pending legislation and political action. *See Mills v. Alabama*, 384 U.S. 214, 218-19 (1966)(noting universal agreement that a major purpose of First Amendment was to protect political speech). "The Constitution specifically selected the press, which includes . . . newspapers, to play an important role in the discussion of public affairs." *Id.* at 219. The Supreme Court has held that gag orders, issued to protect the fairness

of trial, are prior restraints on speech and, therefore, unconstitutional. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976). Additionally, the high court has held that state action infringing upon political speech is subject to strict scrutiny, upheld only where the regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *See Burson v. Freeman*, 504 U.S. 191, 197 (1992).

The Order, which punishes Dr. Caucci for his wife's expression of her political views on the subject of tort reform, does not pass the strict scrutiny test and, therefore, it is unconstitutional. Moreover, the Court cannot retroactively impose a gag order to protect the fairness of trial when it would not be permitted to do so prospectively. The Order has a "chilling effect" on every citizen who wants to voice their views on a manner of pending legislation such as tort reform and the malpractice insurance crises; and, therefore, it cannot stand. In light of the First Amendment's guarantees, Dr. Caucci respectfully requests that this Court strike its Order, awarding attorneys' fees as a sanction for the publication of the editorial.

C. ARGUMENT IN SUPPORT OF DEFENDANT'S MOTION FOR RECUSAL.

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity of and independence of the judiciary may be preserved." *Code of Judicial Conduct*, Canon 1. "A judge

should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including . . . where . . . he has a personal bias or prejudice concerning a party." *Code of Judicial Conduct*, Canon 3(C)(1)(a).

The Court's Order is intemperate in tone, makes false statements that Dr. and Mrs. Caucci admitted wrongdoing, and, by unfounded assumptions, grossly mischaracterizes Dr. Caucci's conduct and Mrs. Caucci's motivation. *See February 4, 2005 Memorandum and Order*, at p. 3-6. Under these circumstances, Dr. Caucci respectfully requests that, upon striking its Order, the Court recuse herself from any further proceedings in this case.

III. CONCLUSION

For the foregoing reasons, Defendant, David J. Caucci, M.D., respectfully requests that the Court rescind the Order entered against him and recuse herself from any further proceedings in this case.

s/ James L. Griffith
James L. Griffith, Esquire
FOX ROTHSCHILD LLP
2000 Market Street, 10th Floor
Philadelphia, PA 19103
(215) 299-2000

Attorneys for Defendant,
David J. Caucci, M.D.

Dated:

APPENDIX B — ORDER OF THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY DATED AUGUST 5, 2005

IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY

CIVIL — JURY TRIAL

No. 2001 CIV 1661

LAWRENCE MEKIC and LOUISE MEKIC,

Plaintiffs,

VS.

DAVIS J. CAUCCI. M.D.,

Defendant,

ORDER

AND NOW, on this 5th day of August, 2005, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that in compliance with this Court's oral order contained in the record of January 19th, 2005. Defendant is ordered to pay $13,286.50 in costs derived from Plaintiffs' trial and preparation there of as itemized in the attachment submitted by Michael J. Foley, Esquire. Per agreement of the parties Plaintiffs' attorney's fees shall be waived.

IT IS ORDERED:

s/ Trish Corbett
Trish Corbett, Judge

APPENDIX C — MOTION FOR RECONSIDERATION DATED AUGUST 30, 2005 AND ORDER DATED AUGUST 5, 2005

IN THE COURT OF COMMON PLEAS OF LACKAWANNA

CIVIL ACTION — LAW

JURY TRIAL DEMANDED
NO. 2001-CIV-1661

LAWRENCE F. MEKIC and
LOUISE MEKIC, his wife,

Plaintiff(s)

vs.

DAVIS J. CAUCCI, M.D.,

Defendant(s)

MOTION FOR RECONSIDERATION OF THIS HONORABLE COURT'S ORDER OF AUGUST 5, 2005

NOW COME THE PLAINTIFFS, by and through their counsel, Foley, McLane, Foley, McDonald & MacGregor, P.C., and hereby move this Honorable Court to reconsider or modify this Honorable Court's Order of August 5, 2005, and in support thereof, aver as follows:

1. On August 5, 2005, the Honorable Trish Corbett issued the following Order in the above-referenced case:

> And now, on this 5 day of August, 2005, it is hereby Ordered, Adjudged and Decreed that in compliance

with this Court's oral Order contained in the record of January 19, 2005, the Defendant is Ordered to pay $13,286.50 in costs derived from Plaintiffs' trial and preparation thereof, as itemized in the attachment submitted by Michael J, Foley, Esq. Per agreement of the parties, Plaintiffs' attorneys' fees shall be waived,

It is so Ordered:

/s/ Trish Corbett, J.

A copy of the Order is attached hereto as Exhibit A,

2. Prior to the issuance of the Court's Order, the undersigned counsel, Michael J. Foley, received a telephone call from the Honorable Trish Corbett, advising that counsel for Dr. Caucci, James L. Griffith, had contacted her and advised that the insurance carrier would pay the costs, but not the attorneys' fees, if that was an acceptable resolution of the issue. Based upon that understanding, Plaintiffs agreed to accept payment of the costs that were listed in Plaintiffs' February 10, 2005, letter, and withdrew their claim for counsel fees, conditioned on the fact that Dr. Caucci, through his insurance carrier, would pay the costs,

3. On or about August 5, 2005, Plaintiffs forwarded a copy of the February 10, 2005 letter to the Honorable Trish Corbett, copying counsel for Dr. Caucci.

4. On August 5, 2005, the Honorable Trish Corbett issued the above-referenced Order.

Appendix C

5. Despite the passage of several weeks and multiple communications, counsel for Dr. Caucci has not been able to procure a check for the agreed-upon amount.

6. Given the foregoing, Plaintiffs' counsel respectfully requests this Honorable Court to review and/or reconsider the Order and to award Plaintiffs counsel fees in addition to the costs, in accordance with the Court's initial January 19, 2005 Order. Plaintiffs' counsel only agreed to the disposition of the matter based upon the representations to Plaintiffs' counsel that Attorney Griffith had represented to the Court that they had authority to resolve the matter for the costs, which were in the amount of approximately $13,000.00.

7. An August 26, 2005 communication from Attorney Griffith indicates that he will be discussing the mater with AIG, a carrier for Dr. Caucci, later this week.

WHEREFORE, in an abundance of caution, the Plaintiff respectfully requests this Honorable Court to reconsider and/or to modify its Order of August 5, 2005 to include attorneys' fees, as set forth in the February 10, 2005 letter to the Court if Dr. Caucci does not pay the agreed-upon amount as Ordered in the August 5, 2005 Order.

Respectfully submitted,

Foley, McLane, Foley, McDonald
& MacGregor, P.C.
Attorneys for Plaintiff

By: s/ Michael J. Foley
Michael J. Foley, Esq.

Appendix C

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

CIVIL — JURY TRIAL

NO. 2001 CIV 1661

LAWRENCE MEKIC and LOUISE MEKIC,

Plaintiffs,

VS.

DAVIS J. CAUCCI. M.D.,

Defendant.

ORDER

AND NOW, on this 5th day of August, 2005, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that in compliance with this Court's oral order contained in the record of January 19th, 2005, Defendant is ordered to pay $13,286.50 in costs derived from Plaintiffs' trial and preparation there of as itemized in the attachment submitted by Michael J. Foley, Esquire. Per agreement of the parties Plaintiffs' attorney's fees shall be waived.

IT IS SO ORDERED:

s/ Trish Corbett
Trish Corbett, Judge

APPENDIX D — ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA DATED DECEMBER 8, 2005

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 1512 MDA 2005

C.P. LACKAWANNA COUNTY 1661-2001

LAWRENCE F. MEKIC AND LOUISE MEKIC

v.

DAVID J. CAUCCI, M.D.

ORDER

The court hereby **GRANTS** the motion to quash/dismiss

PER CURIAM

Date: DEC 08 2005

APPENDIX E — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED JUNE 22, 2006

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

No. 193 MAL 2006

Petition for Allowance of Appeal from the Order of the Superior Court

LAWRENCE F. MEKIC AND LOUISE MEKIC,

Respondents

v.

DAVID J. CAUCCI, M.D.,

Petitioner

ORDER

PER CURIAM

AND NOW, this 22nd day of June 2006, the Petition for Allowance of Appeal is hereby **DENIED**.

Supreme Court, U.S.
FILED
OCT 25 2006
OFFICE OF THE CLERK

No. 06-423

In the United States Supreme Court

DAVID J. CAUCCI, M.D.,
Petitioner,

v.

LAWRENCE F. MEKIC AND LOUISE MEKIC,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. FOLEY, ESQ.
FOLEY, MCLANE, FOLEY,
MCDONALD & MACGREGOR, P.C.
600 LINDEN STREET
P.O. BOX 1108
SCRANTON, PA 18501-1108
(570) 342-8194

Counsel for Respondents

QUESTION PRESENTED FOR REVIEW

Whether the federal question presented by Petitioners, falsely characterizing the ruling below as a supposed criminal "contempt order," tortures the true record and is thus completely inapposite to the present civil tort suit involving a simple remedial award of fees and costs of $13,286.50 by virtue of a state trial court's consent decree which Petitioner never even moved to rescind or modify as required by clear state law.

TABLE OF CONTENTS

Page

STATEMENT OR QUESTION PRESENTED FOR APPEAL i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS THAT A WRIT OF CERTIORARI SHOULD BE DENIED 5

CONCLUSION 9

SUPPLEMENTAL APPENDICES

Appendix A - January 3, 2006 Order of Superior Court of Pennsylvania Denying Motion for Reconsideration 1a

Appendix B - Pennsylvania Rule of Appellate Procedure 302 ..... 2a

Appendix C - 42 Pa. C.S.A. §2503(7) 3a

Appendix D - February 4, 2005 Memorandum and Order 4a

Appendix E - Respondent Mekics' Response to Petition for Allowance of Appeal Filed in Pennsylvania Supreme Court dated February 15, 2006 ..... 12a

TABLE OF AUTHORITIES

FEDERAL AUTHORITIES: Page

Stembridge v. State of Georgia, 343 US 541 (1956) . . . 3, 5

Cf. Murray v. Carter, 477 U.S. 478, 486-492 (1986) 5

PENNSYLVANIA AUTHORITIES:

Bechler v. Oliva, 400 Pa. 299, 161 A.2d 156 (1960) 8

Brenner v. Sukenik, 410 Pa. 324, 189 A.2d 246 (1963) . . 8

Brown v. Com. Dept. of Health, 495 Pa. 456, 434 A.2d 1179 (1981) 7

Daly v. The School District of Darby Township, 434 Pa. 286, 252 Pa. 638, 640 (1969) 2, 7

Pennsylvania Power & Light Co. v. Borough of Shenandoah, 362 Pa. 43, 66 A.2d 290 (1949) . . . 7

Sarsfield v. Sarsfield, 251 Pa. Super. 516, 380 A.2d 899 (1977) 2, 7

RULES AND STATUTES:

Sup. Ct. Rule 10 . . . . . 3, 5

Sup. C. Rule 14(4) 4

Pa. R.A. Procedure 302(a) 2, 3, 5, 6, 7, 9

42 Pa. C.S.A. §2503(7) 1, 3, 9

Standard Pa. Practice 2d, Volume 16, Section 84.114 . . 2, 7

STATEMENT OF THE CASE

This case involves a consent order dated August 5, 2005 issued by the Court of Common Pleas of Lackawanna County, Pennsylvania, in the amount of $13,286.50 for out-of-pocket litigation costs unnecessarily incurred in a disrupted trial that resulted in a mistrial on January 19, 2005. The Pennsylvania trial court's August 5, 2005 consent order (Appendix B) was issued in response to an offer of settlement conveyed directly to the Court on August 3, 2005 by Petitioner's personal counsel, and thereafter accepted by Respondent on August 4, 2005. It did not involve any finding of criminal contempt, or indirect criminal content, as Petitioner asserts herein. Rather, this order represented a civil, compensatory and remedial award by agreement. (See Appendix C, Mekic's Motion for Reconsideration of the Honorable Court's Order of August 5, 2005 20(a)). The purpose of the agreed upon award was to compensate the respondent's Mekic for harm done, clearly a civil remedy.

Previously, in the February 4, 2005 Memorandum and Order of the Pennsylvania trial court recounting the events of the January, 2006 trial, the Court of Common Pleas of Lackawanna County did not sanction the Petitioner with any fine payable to the Court and did not find Petitioner in criminal contempt as erroneously asserted. It simply made a civil and remedial determination in a medical malpractice tort action in accordance with 42 Pa. C.S.A. §2503(7) to compensate the Respondent for harm suffered, a civil compensatory remedy – not a criminal contempt finding.

Thereafter, Petitioner breached the agreement represented by the August 5, 2005 consent order, and filed an appeal to the Pennsylvania Superior Court on September 6, 2005 without filing in the trial court any objection or petition to modify the consent order. That appeal was quashed by the Pennsylvania Superior Court on

December 8, 2005 in response to Respondent's Motion to Quash for failure Petitioner's to comply with Pa. R.A. Procedure 302, and applicable case law.

Pennsylvania has a rule designed to promote efficiency of the administration of justice, maximize accuracy of decisions and minimize errors, which requires that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pennsylvania Rules of Appellate Procedure Rule 302(a). It has risen to the level of hornbook law in Pennsylvania that a party who consents or acquiesces to a judgment or order cannot appeal from that judgment or order without petitioning the lower court to rescind, abrogate or modify the order. Pa. R.A.P. Rule 302(a); *Standard Pa. Practice 2d*, Vol. 16, Section 84.114. *Daly v. School District of Darby Township*, 434 Pa. 286, 252 Pa. 638, 640 (1969); *Sarsfield v. Sarsfield*, 251 Pa. Super. 516, 380 A.2d 899 (1977). This was the basis for Respondent's Motion to Quash the Petitioner's appeal to the Pennsylvania Superior Court.

Petitioner deliberately bypassed the requirement to present its reason for modification to the Pennsylvania trial court after the issuance of the August 5, 2005 consent order memorializing and directing compensatory costs to respondent. Rather, in the month following the August 5, 2005 order, Petitioner's personal counsel deliberately suggested to Respondent's counsel that he was trying to comply with the consent order, and was in the process of attempting to obtain payment from the insurance carrier. However, on the very last day of the appeal period, September 6, 2005, Petitioner took an appeal in open disregard of state consent order practices.

The Pennsylvania Superior Court on December 8, 2005, (Appendix D), quashed the appeal for failure to comply with Pa. R. A. P. Rule 302(a), and denied reconsideration on January 3, 2006 (order not attached to the Appendix by Petitioner). Thereafter, the Pennsylvania

Supreme Court by order of June 22, 2006 (see Appendix E), denied discretionary review. Each decision was well supported by the record, Pennsylvania Rules of Appellate Procedure Rule 302(a), and aforestated decisional law.

The Petition for a Writ of Certiorari should be denied based upon a record that shows the federal issues tendered by Petitioner are not truly presented, and based upon the venerable principle that an adequate and independent state ground would, in any event, bar direct review. Where a state court decision rests upon an adequate and independent state ground, the state ground controls the result of the case; irrespective of the merits of the federal issue. *Stembridge v. State of Georgia*, 343 US 541 (1956). Additionally, Petitioner has presented no "compelling reasons" for their Petition for Writ of Certiorari to be granted, (See Sup. Ct. Rule 10), particularly where that the central premise of the Petitioner's argument never occurred, because the Petitioner was never convicted of criminal contempt.

Rather, the Pennsylvania trial court made a decision on February 4, 2005 that the Defendant's conduct was "vexatious" in accordance with Pa. R.C.P. §2503(7) a basis for awarding compensatory counsel fees and costs to a civil litigant. The Pennsylvania trial court made a determination that the respondents Mekics were entitled to reimbursement of out-of-pocket costs and counsel fees in a February 4, 2005 Memorandum. After settlement discussions, the entire matter had apparently been resolved by agreement for payment of costs alone on August 5, 2005, as the Court's consent order reflects.

Finally, the Petitioner has made deliberate and plain misstatements of fact such as page 7 suggesting that the trial judge "announced the contempt " decision in chambers and did not have any hearing. This is patently false and refuted by the record of January 19, 2005, which Petitioner failed to include in the Appendix. Respondent's counsel

filed a Motion requesting a mistrial with the Lackawanna County Prothonotary on the morning of January 19, 2005 prior to beginning of that trial day. Prior to the January 19, 2005 hearing on the issue, the trial judge met with counsel, and a hearing was subsequently held on the record. The trial judge **specifically directed defense counsel** on the record to consult with his client, and after such consultation thereafter experienced defense counsel responded that his client's wife did not publish the article for "the sole purpose of tainting a jury...", (N.T. pg. 1/19/05, p. 8. l. 16-17), undeniably admitting it was part of her purpose. (See trial courts Memorandum and Order p. 3, February 4, 2005 Supplemental Appendix D at 7a, 10a) Petitioner herein has failed to attach to its Appendix the trial court's memorandum and order of February 4, 2005, or the transcript of the 1/19/05 hearing at which time the mistrial was granted, both of which demonstrate that the Petitioner was not found in criminal contempt, or indirect criminal contempt. This is a violation of Sup. C. Rule 14(4), augering strongly against the Petitioner.

Respondents Mekic did not agree to withdraw their request for counsel fees at the May 16, 2005 hearing, as Petitioner plainly misstates (Petition, p. 5). Petitioner took a different position before the Pennsylvania Superior Court claiming that the trial Judge ruled at a hearing on May 16, 2005 that attorney's fees were not going to be awarded. Neither of Petitioners positions are true. (See Supplemental Appendix 24a-26a).

In this case, Petitioner has reformulated the issues presented and the record made in the state court. The Petition thus displays far more than a simple disregard of the adequate state grounds that independently sustain the remedial consent decree for costs entered below in a routine civil tort action. Indeed, by developing inapposite federal arguments not pressed or passed upon below, and by straining the bounds of the record itself, the Petition invites an impermissible sandbagging of the state court's civil trial

and appeals process. *Cf. Murray v. Carter*, 477 U.S. 478, 486-492 (1986).

REASONS THAT A WRIT OF CERTIORARI SHOULD BE DENIED

Petitioner has presented no "compelling reasons" for their Petition for Writ of Certiorari to be granted, (See Sup. Ct. Rule 10), particularly given the fact that the central premise of the Petitioner's argument, i.e. a criminal contempt conviction, never occurred, thus invalidating the supposed federal premise of the Petition.

The Petition for a Writ of Certiorari should also be denied based upon the traditional principle that an adequate and independent state ground of decision bars direct review of any federal claim asserted in state court litigation. Where a state court decision rests upon an adequate and independent state ground, the state ground controls the result of the case; irrespective of the merits of the federal issue. *Stembridge v. State of Georgia*, 343 US 541 (1956),

The case below presented a straightforward and well settled application of Pennsylvania Rules of Appellate Procedure Rule 302(a), entitled "Requisites for Reviewable Issue," which provides that issues not raised in the lower Court are waived and cannot be raised for the first time on appeal.

The federal contentions advanced by Petitioner have no applicability to the issuance of a consent order in this civil case reflecting settlement of the issue of costs and fees incurred by Respondents, plaintiffs below, due to the mistrial occasioned by Petitioner. Petitioner herein failed to attempt to modify, rescind or abrogate the August 5, 2005 consent Order before the Court of Common Pleas of Lackawanna County, Pennsylvania. Since no issue was preserved for appeal, the Pennsylvania Superior Court properly quashed and dismissed Dr. Caucci 's appeal from

the August 5, 2005 consent Order because failure to comply with the requirement that a petition to modify, abrogate or rescind the consent order initially be presented to the trial court. The Pennsylvania Superior Court (*en banc*) properly denied reconsideration by per curiam order on January 3, 2006. The Pennsylvania Supreme Court justifiably denied discretionary review on June 22, 2006.

Any complaint regarding the lack of a fully developed record is a direct result of Petitioner's actions in failing to take appropriate steps below to create a record – one of the primary reasons for Pa.R.A.P. Rule 302(a). The independent and adequate state ground of decision is supported by the state interest, in the efficient administration of justice which Petitioners conduct herein has frustrated. Contemporaneous objection, or petition to modify, rescind or abrogate a consent order, and creation of an appropriate record, on both sides, affords the trial judge an opportunity to weigh the competing arguments and to maximize the opportunity for arriving at the correct decision and to minimize errors. If this rule is not enforced, trial counsel can sandbag the trial judge and not raise objections when the issue can be most expeditiously and efficiently resolved. The burden of preserving an issue and record for appeal is on the Petitioner. Pennsylvania Rules of Appellate Procedure Rule 302(a), entitled "Requisites for Reviewable Issue" provides, in pertinent part:

> (a) General Rule. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.

Id.

It has risen to the level of hornbook law that a party who consents or acquiesces to a judgment or order cannot appeal from that judgment or order without petitioning the lower court to rescind, abrogate or modify the order.

Pa.R.A.P. Rule 302(a). *Standard Pa. Practice 2nd*, Volume 16, Section 85.114 provides, in pertinent part:

> Ordinarily, a party who consents to or acquiesces in a judgment or order cannot appeal from that judgment or order. (Citing *Pennsylvania Power & Light Co. v. Borough of Shenandoah*, 362 Pa. 43, 66 A.2d 290 (1949); *Brown v. Com. Dept. of Health*, 495 Pa. 456, 434 A.2d 1179 (1981).

Any move to modify or abrogate a consent order must be initiated before the trial court, as required by Pennsylvania Rules of Appellate Procedure Rule 302(a). See, *Sarsfield v. Sarsfield*, 251 Pa. Super. 516, 380 A.2d 899 (1977).

In *Sarsfield v. Sarsfield*, 251 Pa.Super, 516, 380 A.2d 899 (1977), the Pennsylvania Superior Court held that a party could not appeal from a consent decree dropping a former wife's claim for certain support arrearages, directing payment of others, and reaffirming a former husband's obligation to comply with a post-nuptial agreement where the party did not preserve any objections to the consent order before the lower court.

The Pennsylvania Supreme Court decision of *Daly v. The School District of Darby Township*, 434 Pa. 286, 252 A.2d 638, 640 (1969), involved a suit by a taxpayer and parent against elementary schools, seeking to enjoin implementation of a School Board resolution requiring the integration of elementary schools on a ratio of two black pupils to one white period. At an initial hearing before the Chancellor, settlement discussions were initiated before all of the parties. In an off-the-record meeting with the Chancellor, counsel for the School Board offered a proposed settlement, to which counsel for the appellant did not object and, therefore, acquiesced. As a result, the court issued an order denying as moot the appellant's petition for a

preliminary injunction and ordered compliance with the new plan that had been formulated by consent.

Subsequently, the appellant parent, on behalf of the minor, hired new counsel and then filed a notice of appeal, challenging the jurisdiction of the court.

With respect to the order of settlement issue, the Pennsylvania Supreme Court ruled that:

> Appellant's first contention is barred by appellant's participation in the October 4 settlement. Appellant's appeal apparently came as a great surprise to the chancellor, who in his opinion stated that "it was finally agreed (or I thought it was agreed) that the most workable plan would be as follows (the plan and its justification follow) * * *. Our plan did not work. The plaintiff changed lawyers and the new lawyer insists on having the case heard by the Supreme Court. Appellant, of course, cannot agree to a judicial settlement and then claim that because she has new counsel, she may take an appeal from that very agreement. Having made no objection to the chancellor's adjudication implementing the settlement, appellant is now bound by it, since having never objected below to the plan which was finally adopted, appellant cannot raise her objections for the first time on this appeal. See, e.g., *Bechler v. Oliva*, 400 Pa. 299, 161 A.2d 156 (1960); *Brenner v. Sukenik*, 410 Pa. 324, 189 A.2d 246 (1963).

Id. at 289, 252 A.2d at 640.

Petitioner, Dr. Caucci, attempted to appeal to the Pennsylvania Superior Court, Pennsylvania Supreme Court and now this Honorable Court, from the August 5, 2005

Order that he consented to. Petitioner did not file any pleading or motion with the trial Court seeking to have the August 5, 2005 Order rescinded, modified or abrogated, required by the Pennsylvania Rules of Appellate Procedure Rule 302(a) and well settled decisional precedent.

This action by Petitioner, Dr. Caucci, of taking an appeal, which was quashed, and now requesting discretionary allowance of appeal from an Order that he consented to, acquiesced in, and initiated, has further delayed the resolution of the claim below, to the great injury of Lawrence Mekic and Louise Mekic, the Respondents herein. This again has disrupted the orderly administration of justice.

CONCLUSION

Petitioner was not convicted of criminal contempt. He was directed to pay a civil, compensatory and remedial award of counsel fees to a litigant that was harmed by the "vexatious" conduct of him and his wife in accordance with 42 Pa. C.S.A. §2503(7). The matter was resolved by issuance of a consent order by the Court on August 5, 2005 in response to an offer of settlement by Petitioner's personal counsel.

Petitioners federal contentions regarding a supposed criminal conviction are inapposite to the consent orders and purpose, and are not germane to the record of proceedings below. The decisions of the state appellate courts are furthermore well supported by an adequate state ground which provides no basis, or reason, for this Honorable Court's review.

Accordingly, for all of the foregoing reasons, Respondents, Lawrence Mekic and Louise Mekic, hereby respectfully request this Honorable United States Supreme Court to deny the Petition for Certiorari.

Respectfully submitted,

FOLEY, McLANE, FOLEY, McDONALD & MacGREGOR, P.C.

BY: Michael J. Foley, Esq.
PA Attorney I.D. No. 39855
Foley, McLane, Foley, McDonald & MacGregor, P.C.
600 Linden Street
P.O. Box 1108
Scranton, PA 18501-1108
(570) 342-8194

Counsel for Respondents

SUPPLEMENTAL APPENDIX

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA
(C.P. Lackawanna County No. 1661-2001)
No. 1512 MDA 2005
Filed: January 3, 2006

Lawrence F. Mekic and
Louise Mekic

v.

David J. Caucci, M.D.

ORDER

The application for reconsideration of this Court's order of December 8, 2005 is hereby **DENIED**.

Per Curiam

[STAMP]
TRUE COPY FROM RECORD
Attest: JAN 03 2006
/s/_____
Deputy Prothonotary
Superior Court of PA - Middle District

Appendix B

Pennsylvania Rules of Appellate Procedure Rule 302:

Rule 302. Requisites for Reviewable Issue

(a) **General rule**. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.

Appendix C

42 Pa. C.S.A. § 2503(7):

§2503. Right of participants to receive counsel fees

The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:

***

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of the matter.

Appendix D

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY
CIVIL ACTION – LAW
2001 CIV 1661

LAWRENCE F. MEKIC and
LOUISE MEKIC, his wife
Plaintiffs

v.

DAVID J. CAUCCI, M.D.,
Defendants

[DATE STAMP
LACKAWANNA COUNTY
2005 FEB -4 P 1:40
CLERK OF JUDICIAL
RECORDS]

MEMORANDUM AND ORDER

CORBETT, J.

AND NOW, this 4th day of February 2005, after consideration of the Plaintiffs' Motion for Default Judgment or in the alternative a Mistrial and payment of Plaintiffs' attorneys' fees, for the reasons set forth herein, it is the decision of this Court that a mistrial be declared and the Defendant be required to personally pay the Plaintiffs' costs and reasonable attorneys fees for trial preparation accrued for the period immediately prior to the scheduled trial up to and including January 19, 2005.

I. BRIEF FACTS:

This matter was originally scheduled for trial in November 2004. On September 30, 2004, it was Ordered that the jury trial be rescheduled for January 17-21, 2005. The trial actually began on January 18, 2005 due to the Martin Luther King holiday.

As a result of this trial being scheduled to begin on January 18, 2005 and other trial activity occurring in this Court the Lackawanna County Court Administrator selected jurors from a jury pool to appear in this Court on January 18, 2005. From that jury pool, counsel for the parties selected twelve jurors and two (2) alternates all from Lackawanna County. Opening statements were given and the plaintiff called witnesses.

In the January 18, 2005 evening edition of the *Scranton Times*, which serves the greater Lackawanna County area, on the editorial page in the "Letters to the Editor" section appeared a letter written by the Defendant's wife, Elizabeth Caucci, who identified herself as the Clarks Summit President of the Lackawanna County Medical Society Alliance. The letter titled, "*Malpractice Suits a Major Drawback*", read in pertinent part as follows:

> Editor: A recent survey from the Kaiser Family Foundation and the Harvard School of Public Health found 63 percent of adults in the U.S. cite lowering the costs of health care and health insurance as a top priority for the president and Congress. In addition, health care overall tied with terrorism/national security as the third most important issue.

> In a recent article, Scranton attorney David Fallk was incorrect in his assessment of the survey results. The report finds that the public considers malpractice lawsuits a significant factor in the rising costs of health care. Almost one-third of the people say that the most important factor in causing rising malpractice insurance rates is too many lawyers filing unwarranted lawsuits, while only 15 percent believe it is the high profits of insurers. Sixty-three percent favor caps on so-called pain and suffering awards. In truth, the title of the press release reads "Americans Favor Malpractice Reform."
>
> The loss of obstetrics at Mercy Wilkes Barre is an indication of the impact the medical liability crisis is having on our health care locally. There is no indication that the loss of medical services to our local patient population will not persist.
>
> Despite minor reforms, medical liability premiums rose again for 2005. The real cost is that patients are losing access to care because doctors are losing the ability to practice medicine.

Plaintiffs argue that the content of this letter implies that the lawsuit against her husband is "unwarranted." (See Trans., pg. 4). Plaintiffs also argue that the suggestion in the letter of caps on awards for pain and suffering tainted the jury. It tainted the jury because it will now have them considering placing a cap on any pain and suffering award it was considering, in contravention of Pennsylvania law.

Plaintiffs suggest that this letter was a purposeful attempt to get the jurors to do what interest groups have been unable to do, place caps on any award. In fact, Plaintiffs suggest that the letter was an attempt to tell this jury pool that if they did not decide in favor of the Defendant, they would be going against the President and Congress among others.[1] Plaintiffs claim that they have spent over $10,000.00 getting ready for this trial.

Defendant informed the Court that the article was submitted to the Scranton Times for publication in the week prior to the scheduled trial date. Defendant maintained that his wife "did not submit the article for the sole purpose of tainting a jury." (See Trans., pg. 8). Defendant maintains, however, that his wife did not know whether the article would be printed and, if it was, when it would be printed. Defendant's wife admitted she is a frequent contributor to The Times and acknowledged there is generally a few day turn around for publication.

Defendant, while not denying that the jury pool was tainted, suggested that a mistrial may be premature. He Defendant requested that the selected jury be polled. He argued that this would enable the Court to learn if the selected jury actually saw the article and if it was actually tainted. If the jury did not see the article, Defendant suggested continuing with the trial after appropriate cautionary instructions.

---

[1]Plaintiffs also claim the letter implicitly states that if the jury issues an award against the doctor it will be doing so at its own peril since malpractice lawsuits cause doctors to stop practicing medicine. (See Trans., pg. 6).

II. DISCUSSION:

Under Pennsylvania law, "[o]nce the existence of a potentially prejudicial extraneous influence has been established by competent testimony, the trial judge must assess the prejudicial effect of such influence." *Carter v. U.S. Steel Corp.*, 529 Pa. 409, 604 A.2d 1010 (1992). The test to determine if prejudice exists is an objective one since the "trial judge is precluded from considering evidence concerning the subjective impact of an extraneous influence on any jury." *Id.* at 1016. In making its decision, the trial judge must decide ~~how an~~ "objective, typical juror would be affected by such an influence." *Id.*

In determining the reasonable likelihood that prejudice exists "'the trial judge should consider: (1) whether the extraneous influence relates to a central issue in the case or merely involves a collateral issue; (2) whether the extraneous influence provided the jury with information they did not have before them at trial; and (3) whether the extraneous influence was emotional or inflammatory in nature." *Id.* at 1016.

In this case, the parties were well aware of the scheduled trial date since it was set some three and a half months prior by Order of this Court. Both parties received copies of the filed Order and were present and prepared on the scheduled date.

Despite this knowledge, Defendant's wife chose to submit and have a letter published in the sole daily newspaper which serves this county at the time of trial. The issues raised in the letter are issues which relate directly to issues which will be decided at trial. These issues include, but are not limited to, the damages which could be awarded, whether certain caps should be imposed on any damages and the potential after effect of

the jury's decision if it decided for the Plaintiffs. The subject of the article contained information prohibited for consideration by the jury.

The letter was also inflammatory. As Plaintiffs indicated, the letter suggested that if damages are awarded in malpractice cases such as this, doctors, such as the Defendant, will be forced to close their practice. For these reasons, it is very clear that this publication was reasonably likely to cause prejudice.[2]

The fact that the Defendant's wife was present all day on January 18, 2005 provides support for this finding. She was present during the selection of the jury. She was introduced to the jury and sat behind the Defendant during the proceedings. The jury was certainly aware of her presence and who she was.

Under Pennsylvania law, a "participant may be awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter." 42 Pa.C.S.A. 2503(7). It is the finding of this Court that the conduct of the Defendant during the pendency of the trial was vexatious. Defendant did not deny that the published letter was meant to taint the jury. The tainted jury would undoubtedly prejudice the jury against any claim Plaintiffs would make during the trial or any award the jury might decide to give.

"Vexatious" is defined as "without reasonable or probable cause or excuse; harassing; annoying." Black's Law Dictionary. (7th Ed.). There is no doubt that the content of the letter published in a newspaper whose

---

[2]It was not necessary for the Court to poll the jury to make this objective determination.

general circulation is primarily in Lackawanna County on the evening of the first day of trial by the Defendant's wife was vexatious. This is especially true in light of the fact that the Defendant was aware that the letter could taint the jury and was fully aware that its content addressed issues which would be decided at trial.

Throughout the first day of trial, the Defendant was observed making sarcastic grins and other obtuse facial expressions and gestures at every opportunity. His behavior was observed by this Court and specifically addressed in Plaintiffs' Motion. To the Court the Defendant's behavior showed an obvious disdain for its authority and a total lack of respect to the Court and the entire process. At the time of observation the Court was of the opinion that Defendant did so at his own peril. In light of the letter, however, Defendant's actions appear to be more calculating and contemptuous. In hindsight, the Defendant's behavior appears to be in furtherance of the arguments and ideas raised in the letter.

The Court respects the Defendant and his wife's right to express their opinion or publish a letter pontificating on the subject of malpractice or any other matter they deem important. However, when the specific purpose of that expression or publication is designed to taint the jury and ultimately impact its ability to make unbiased decisions in Defendant's own trial, that action is going beyond the freedoms allowed. It must again be emphasized that the Defendant admitted the letter, at least in part, was designed to taint the jury. Defendant and his wife's right to freedom of speech during the course of the trial must be balanced against the Plaintiffs' right to a fair and impartial trial.

Since the aforementioned conduct was vexatious, this Court awards sanctions in the form of reasonable

attorney fees to Plaintiffs. The attorney fees are to be paid directly by the Defendant since it was the action of his wife that caused the mistrial and because it was admitted that the purpose of the letter was, at least in part, to taint the jury. The Court shall view the Plaintiffs' calculation of costs and attorney fees to determine what is reasonable before any are actually awarded.

BY THE COURT:

/s/ _____ J.
TRISH CORBETT

Michael J. Foley, Esquire
Linden Plaza
600 Linden Street
Scranton, PA 18501-1108
Attorney for Plaintiffs

John T. McGrath, Esquire
401 Adams Avenue, Suite 400
Scranton, PA 18510
Attorney for Defendant

Appendix E

IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. 47 M.T. 2006

LAWRENCE F. MEKIC and LOUISE MEKIC,

Respondents

v.

DAVID J. CAUCCI, M.D.,

Petitioner

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR ALLOWANCE OF APPEAL

Michael J. Foley, Esq.
Attorney I.D. No. 39855
Foley, McLane, Foley, McDonald & MacGregor, P.C.
600 Linden Street, P.O. Box 1108
Scranton, PA 18501-1108
(570) 342-8194

Attorney for Respondents
LAWRENCE MEKIC and LOUISE MEKIC

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement or Question Presented for Appeal Did the Superior Court properly quash the appeal of Petitioner herein from the August 5, 2005 consent Order issued by the Court of Common Pleas of Lackawanna County, where Petitioner failed to petition the lower Court to modify, rescind or abrogate the August 5, 2005 consent Order in order to preserve any issues for Appeal in accordance with Pennsylvania Rules of Appellate Procedure ("Pa.R.A.P.") Rule 302(a)?	1
Statement of the Case	2
Reasons that Allowance of Appeal Should be Denied This case presents a straightforward and well settled application of Pennsylvania Rules of Appellate Procedure Rule 302(a), entitled "Requisites for Reviewable Issue," which provides that issues not raised in the lower Court are waived and cannot be raised for the first time on appeal.	12
Conclusion	16
Exhibit A – Lower Court Opinion *Mekic v. Caucci* (Lackawanna County 2001 Civ 1661) Memorandum and Order of Hon. Trish Corbett, Filed in the Court of Common Pleas of Lackawanna County February 4, 2005	iii

Page

Exhibit B iv

Mekics' Motion for Reconsideration of the August 5, 2005 Order of the Court of Common Pleas, which Motion was Filed in the Court of Common Pleas of Lackawanna County on August 30, 2005

Affidavit of Service v

TABLE OF AUTHORITIES

	Citation	Page(s)
1.	*Bechler v. Oliva*, 400 Pa. 299, 161 A.2d 156 (1960)	15
2.	*Brenner v. Sukenik*, 410 Pa. 324, 189 A.2d 246 (1963)	15
3.	*Brown v. Com. Dept. of Health*, 495 Pa. 456, 434 A.2d 1179 (1981)	14
4.	*Commonwealth v. Ashton*, 824 A.2d 1198 (Pa. Super. 2003)	6, 8
5.	*Daly v. The School District of Darby Township*, 434 Pa. 286, 252 A.2d 638, 640 (1969)	14
6.	*Diamond v. Diamond*, 715 A.2d 1190, 1196, n.10 (Pa. Super. 1998);	4, 5, 6, 7, 8
7.	*Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974)	4
8.	*Hicks v. Feiock*, 45 U.S. 624, 631-632, 108 S.C. 1423, 99 L.ED.2D 721 (1988)	5
9.	*Kulp v. Hrivnak*, 765 A.2d 796 (Pa. Super. 2000)	7, 8
10.	*Patterson v. People of the State of Colorado, ex. rel. Attorney General*, 205 U.S. 454, 562, 27 S.Ct. 556, 558, 51 L.ED. 879 (1907)	3
11.	*Pennsylvania Power & Light Co. v. Borough of Shenandoah*, 362 Pa. 43, 66 A.2d 290 (1949)	14

12.	*Sarsfield v. Sarsfield*, 251 Pa. Super. 516, 380 A.2d 899 (1977)	14
13.	*Vito v. Vito*, 380 Pa. Super. 258, 259-62, 551 A.2d 573, 574 (1998)	5
14.	Pa.R.C.P. Rule 302(a)	1, 13, 14
15.	Pa.R.C.P. Rule 3517	11
16.	42 Pa.C.S.A. 2503(7)	3, 4, 7, 8

STATEMENT OR QUESTION PRESENTED FOR APPEAL:

Did the Superior Court properly quash the appeal of Petitioner herein, David J. Caucci, M.D., from the August 5, 2005 consent Order issued by the Court of Common Pleas, where Dr. Caucci failed to petition the lower Court to modify, rescind or abrogate the August 5, 2005 consent Order in order to preserve any issues for Appeal in accordance with Pennsylvania Rules of Appellate Procedure ("Pa.R.A.P.") Rule 302(a)?

SUGGESTED ANSWER:

Yes.

Petitioner, Dr. Caucci, failed to preserve any issue for appeal by failing to file a petition to modify, rescind or abrogate the August 5, 2005 consent Order before the Court of Common Pleas of Lackawanna County. Rather, on September 6, 2005, Petitioner, Dr. Caucci, filed a Notice of Appeal of the August 5, 2005 consent Order to the Pennsylvania Superior Court without preserving any issue for appeal from the consent Order, in accordance with Pa.R.A.P. 302(a). The Pennsylvania Superior Court properly quashed his appeal by *Per Curiam* Order on December 8, 2005. Further, the Pennsylvania Superior Court subsequently denied Dr. Caucci's application for reconsideration of the Pennsylvania Superior Court's Order of December 8, 2005, by *Per Curiam* Order dated January 3, 2006.

STATEMENT OF THE CASE:

This case involves a medical malpractice trial that began on January 18, 2005 in the Court of Common Pleas of Lackawanna County, before the Honorable Trish Corbett. A jury was selected; opening statements were given; and witnesses were called. A mistrial was declared on January 19, 2005, because of the vexatious conduct of the Defendant/Petitioner, David J. Caucci, M.D., and his wife, Elizabeth Caucci, who had identified herself as "President of the Lackawanna County Medical Society Alliance." Mrs. Caucci was present throughout the proceedings, including jury selection, opening statements, testimony and arguments in Court and provided a list of questions that defense counsel should be making inquiry about in preparation for the case.[1]

For reasons expressed in the trial Court's February 4, 2005 Memorandum and Order, Petitioner, Dr. Caucci, visibly and repeatedly expressed disdain for the lower Court in his conduct throughout the proceedings. Petitioner, Dr. Caucci, failed to attach the February 4, 2005 Memorandum of the Honorable Trish Corbett to his Petition for Allowance of Appeal.

On the evening of the first day of trial, after the jury was empaneled, Elizabeth Caucci, who identified herself as "President of the Lackawanna Medical Society Alliance," prominently published a Letter to the Editor in the only newspaper of general distribution in Lackawanna County, *The Scranton Times*, entitled "Malpractice Suits – A Major Drawback." Mrs. Caucci

---

[1]See Footnote 1 of "Plaintiffs' Brief in Response to Defendant's Motion to Strike and Motion to Recuse filed by David Caucci, M.D." Plaintiff filed this Brief of record on April 14, 2005 in the Court of Common Pleas of Lackawanna County.

deliberately sent her letter to *The Scranton Times* no more than five (5) days before the trial, knowing that it would be published during the trial or on the eve of trial (which had been specially listed since September 2004). The text of the entire letter is contained in the Court's February 4, 2005 Memorandum and Order which is attached hereto as Exhibit A. The most egregious aspect of the letter is that Mrs. Caucci was clearly attempting to influence the empaneled jury by suggesting that a verdict for the Mekics in her husband's case would raise the jury's own personal health care premiums and would restrict their access to health care, thus suggesting that the jury had a personal stake in the outcome.[2]

The Court of Common Pleas of Lackawanna County made a specific finding that Dr. Caucci's conduct was "vexatious," in accordance with 42 Pa.C.S.A. §2503(7), which allows an award of counsel fees against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter. (See February 4, 2005 Memorandum and Order, which is attached hereto). The Trial Court **did not impose any fine payable to the Court** on Petitioner, Dr. Caucci (which might be considered an "indirect criminal contempt").

At the January 19, 2005 hearing, Petitioner, Dr. Caucci, was represented by counsel, Attorney John McGrath. Petitioner, Dr. Caucci's, counsel did not

---

[2]Mr. Justice Oliver Wendell Holmes said in *Patterson v. People of the State of Colorado, ex. rel. Attorney General*, 205 U.S. 454, 562, 27 S.Ct. 556, 558, 51 L.ED. 879 (1907):

> **The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.**

request an evidentiary hearing but, in argument, stated that Mrs. Caucci ". . . did not print [the article] for the **sole** purpose of tainting the jury . . ." (See Transcript, January 19, 2005, p. 8, l. 16-17), thus undeniably admitting that it was a motive of her publication [Emphasis added]).

After a hearing on the record, in which Petitioner, Dr. Caucci's, counsel made a tactical decision and did not request to offer any testimony from the Cauccis or other witnesses, a mistrial was declared on January 19, 2005. The Honorable Trish Corbett, Judge of the Court of Common Pleas of Lackawanna County, entered an oral Order on the record that Respondents' Mekics attorneys' fees and costs would be awarded, but the Court directed counsel to submit a calculation of reasonable attorneys' fees and costs to the Court. Petitioner, Dr. Caucci, through counsel, did not timely object that he was being convicted of indirect criminal contempt without being afforded due process, or that Mrs. Caucci's First Amendment rights were being abridged. See, *Diamond v. Diamond,* 715 A.2d 1190, 1196, n.10 (Pa. Super. 1998)(failure to make a timely and specific objection and to request an evidentiary hearing constitutes a waiver of any procedural due process claim); See, generally, *Dilliplaine v. Lehigh Valley Trust Co.,* 457 Pa. 255, 322 A.2d 114 (1974). The Court issued a Memorandum and Order on February 4, 2005.

Contrary to the Petitioner's assertions herein, the Court of Common Pleas of Lackawanna County did not find Dr. Caucci in "criminal contempt" (or "indirect criminal contempt" as Dr. Caucci argued to the Pennsylvania Superior Court below) but, rather, made a finding of "vexatious conduct," in accordance with 42 Pa.C.S.A. §2503(7). The trial Court issued a civil, remedial, and compensatory award of costs to the

Respondents, Lawrence and Louise Mekic, to ameliorate the harm caused by Petitioner, Dr. Caucci, and his wife. The dominant purpose of the award was clearly to compensate the Respondents Mekic for harm done – clearly a civil remedy. The Court of Common Pleas of Lackawanna County did not sanction Petitioner, Dr. Caucci, with any **fine payable to the Court**, which might then be considered an "indirect criminal contempt," which Respondent had raised for the first time in his Motion to Strike, filed February 14, 2005, twenty-five (25) days after the mistrial.

The *Diamond* court, cited by Petitioner, demonstrates that (1) when the fine is both unconditional and **payable to the court**, that portion of the judge's order is criminal rather than "civil" and (2) where the order requires payment of costs or attorneys' fees to a party to remedy a harm by "vexatious" conduct, the court's order is civil. Petitioner confuses the application of the rule where a payment **to the court** is considered remedial when the defendant can avoid paying a fine **to the court** simply by complying with the court's order.

In *Diamond*, the Pennsylvania Superior Court stated:

> In this case, the [$500] fine imposed was both unconditional and **payable to the court**. Thus, the punishment was both "certain" and beyond appellant's power to escape. These facts clearly render that part of the judge's order criminal instead of civil. Citing *Vito v. Vito*, 380 Pa. Super. 258, 259-62, 551 A.2d 573, 574 (1998), cited with approval in *Hicks v. Feiock*, 45 U.S. 624, 631-632, 108 S.C. 1423, 99 L.ED.2D 721 (1988) (**"if the relief provided is a fine,**

> **it is remedial when it is paid to the complainant, and punitive when it is paid to the court, although a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.")**[3]

Diamond v. Diamond, 715 A.2d at 1194 (emphasis added).

Also, Petitioner fails to recognize that the *Diamond* decision dismissed as interlocutory the appeal from the portion of the court's order granting Mrs. Diamond $3,000 in counsel fees because it was not a criminal contempt order, but rather was civil. *Id.* 715 A.2d at 1199.

In *Commonwealth v. Ashton*, 824 A.2d 1198, 1200 (Pa. Super. 2003), the contempt order directed that "James F. Donohue shall pay forthwith a fine of $500.00 **to the Clerk of Court** . . ." *Id.* 824 A.2d at 1200 [emphasis added].

On or about February 10, 2005, Plaintiffs/ Respondents submitted a calculation of costs and

---

[3]In Footnote 2, the *Diamond* decision stated that:

> By order dated March 18, 1997, the trial court entered a further order clarifying that the $500 fine was "payable to the Prothonotary as a consequence of [husband] having been found in contempt of the order of 8/9/96.

Id. 715 A.2d at 1192

attorneys' fees to the Honorable Trish Corbett and to defense counsel for Defendant/Petitioner Dr. Caucci. This included a calculation of $13,286.50 for out-of-pocket expenses incurred by the Plaintiffs/Appellees for the approximately two weeks leading up to the trial and mistrial. A separate calculation of attorneys' time was submitted to the Court for a period of nine (9) days, a conservative estimate for lead counsel alone, totaling 74.7 hours. In the February 10, 2005, letter, Appellee/ Plaintiffs' counsel stipulated that he would accept the identical hourly rate of defense counsel, which was asserted to be $150.00 per hour.

On or about February 14, 2005, Petitioner, Dr. Caucci, filed a Motion to Strike, attempting to raise issues that were not raised at the on the record hearing on January 19, 2005, or even prior to the issuance of the lower Court's Memorandum and Order of February 4, 2005. The Plaintiffs/Respondents Mekic, through counsel, opposed the untimely raising of the issues, such as "indirect criminal contempt, due process and retroactive gag order" on both procedural and substantive grounds, including defense counsel's tactical decision not to call witnesses at the January 19, 2005 hearing and failure to timely raise any First Amendment issues. While this case does not involve an "indirect criminal contempt," the very case, *Diamond v. Diamond*, 715 A.2d 1190, 1196, n. 10 (Pa. Super. 1998), cited by Petitioner, Dr. Caucci, demonstrates that failure of counsel to timely object to the nature of the proceeding constitutes a waiver of the right to challenge an indirect criminal contempt conviction for lack of procedural due process. See *Diamond v. Diamond*, 715 A.2d 1190, 1196 n. 10 (Pa. Super. 1998).

The Motion to Strike was briefed and argued on or about May 16, 2005. The Trial Court Judge, the

Honorable Trish Corbett, attempted to begin to mediate the counsel fees and costs issue at that time.

Respondents Mekic did not agree to withdraw their request for counsel fees at the May 16, 2005 hearing, as Petitioner plainly misstates (Petition, p. 5). In fact, on May 19, 2005, undersigned counsel wrote a supplemental letter brief in support of the Mekics' request for counsel fees and costs, pointing out that Petitioner's counsel had created Supreme Court authority out of whole cloth at the argument before Judge Corbett of May 16, 2005.

> I am writing this letter as a follow up to the argument of counsel for Dr. Caucci, Mr. Griffith, regarding his citation to *Kulp v. Hrivnak*, which he asserted was a Supreme Court case that rebutted the Pennsylvania Superior Court cases that a counsel fee award under 42 Pa.C.S.A. § 2503(7) is not an "indirect criminal contempt," but rather, a remedial compensatory award payable to the Mekics. Dr. Caucci cited in his Brief, *Diamond v. Diamond*, 715 A.2d 1190, 1199 (Pa. Super. 1998) and *Commonwealth v. Ashton*, 824 A.2d 1198 (Pa. Super. 2003). Rather than support Dr. Caucci, both *Diamond* and *Ashton* recognize that where the counsel fee award is payable to the complaining party, the matter is not an indirect criminal contempt, but a civil remedial award. The cases cited by Dr. Caucci establish that **only where a fine is payable to the Court**, the Order is considered an indirect criminal contempt.

* * *

> The reason that I was not familiar with the Supreme Court case of *Kulp v. Hrivnak*, 765 A.2d 796 (Pa. Super. 2000), is because there is no Supreme Court decision by that title at that cite. *Kulp v. Hrivnak* was a Superior Court case which actually supports the position of the Plaintiff/s that your Order was entered appropriately in this case under 42 Pa.C.S.A. § 2503(7).

(Letter was attached as an Exhibit to Affidavit of Michael J. Foley, Esq., in support of the Motion to Quash before the Pennsylvania Superior Court).

On or about August 3, 2005, counsel for Petitioner, Dr. Caucci, advised the Honorable Trish Corbett in a telephone conversation that Petitioner, Dr. Caucci, would agree and acquiesce to an Order for payment of costs incurred by the Respondents prior to the mistrial in the above-referenced matter, if his insurance carrier would be permitted to pay the costs, but would not pay counsel fees voluntarily. Previously, Judge Corbett had insisted that Petitioner, Dr. Caucci, personally pay the costs and counsel fees to Respondents' counsel.

In response to Petitioner, Dr. Caucci's, offer, on or about August 4, 2005, the Honorable Trish Corbett contacted the undersigned counsel for the Plaintiffs/ Respondents and related the offer conveyed by Petitioner, Dr. Caucci's, counsel to her on August 3, 2005. In response to Petitioner, Dr. Caucci's offer, Plaintiffs/ Respondents' counsel agreed to waive attorneys' fees (74.7 hours for approximately nine (9) days leading up to and including trial) with the express agreement and understanding that the litigation costs of $13,286.50

previously submitted on or about February 10, 2005, would be paid shortly thereafter by Petitioner, Dr. Caucci's, insurance carrier. After this agreement was reached, Respondents' counsel had expected that the case would then be moved back onto the trial docket.

In response to that offer and acceptance, based on the representations of both counsel for Petitioner, Dr. Caucci, and undersigned counsel, the Honorable Trish Corbett issued a consent Order on August 5, 2005, directing that Petitioner, Dr. Caucci, pay Plaintiffs' costs of $13,286.50. In response to the August 3 and August 4, 2005 representations of counsel, the trial Court's August 5, 2005 Order specifically reflected that Plaintiffs would waive the payment of counsel fees, by agreement of counsel. This August 5, 2005 Order states:

> AND NOW, on this 5th day of August, 2005, IT IS HEREBY ORDERED, ADJUDGED and DECREED that in compliance with this Court's oral order contained in the record of January 19, 2005, Defendant is ordered to pay $13,286.50 in costs derived from Plaintiffs' trial and preparation there of as itemized in the attachment submitted by Michael J. Foley, Esquire. Per agreement of the parties, Plaintiffs' attorneys' fees shall be waived.

Subsequently, Petitioner, Dr. Caucci failed to comply with the agreement.

In an attempt to fulfill the agreement, Mr. Griffith, counsel for Petitioner, Dr. Caucci, also wrote to undersigned counsel, Michael J. Foley, on August 23, 2005, in pertinent part, that **"if I do not receive his**

check, I will call you on Wednesday." (See Griffith correspondence to Michael J. Foley, dated August 23, 2005, submitted regarding the Motion to Quash and/or Dismiss in the Superior Court below).

In an abundance of caution, Plaintiffs/ Respondents thereafter filed a Motion for Reconsideration, on or about August 30, 2005, requesting the Court of Common Pleas of Lackawanna County to reconsider the August 5, 2005 Order pertaining to the waiver of counsel fees, if Petitioner, Dr. Caucci, breached the agreement. **The Motion for Reconsideration reflects what is asserted herein by Respondents Mekic and was to be reviewed by Judge Corbett, who obviously knew what had transpired. (See Exhibit B).** In Paragraph 2 of Mekic's Motion for Reconsideration of the August 5, 2005 Order, the Respondents herein recounted the events leading up to the issuance of the August 5, 2005 consent Order.

> 2. Prior to the issuance of the Court's Order, the undersigned counsel, Michael J. Foley, received a telephone call from the Honorable Trish Corbett, advising that counsel for Dr. Caucci, James L. Griffith, had contacted her and advised that the insurance carrier would pay the costs, but not the attorneys' fees, if that was an acceptable resolution of the issue. Based upon that understanding, Plaintiffs agreed to accept payment of the costs that were listed in Plaintiffs' February 10, 2005, letter, and withdrew their claim for counsel fees, conditioned on the fact that Dr. Caucci, through his insurance carrier, would pay the costs.

(See Exhibit B attached hereto).

However, the Court of Common Pleas could not act on the issue before the Petitioner, Dr. Caucci, filed a Notice of Appeal on September 6, 2005, without preserving any objections to the issuance of the consent Order.

Petitioner failed to take any steps to preserve any issues for appeal before the trial court, such as objecting to the consent Order, or seeking to have the Court of Common Pleas modify or rescind the consent settlement Order of August 5, 2005.

Petitioner, Dr. Caucci, filed his Docketing Statement in the Pennsylvania Superior Court on or about September 28, 2005. In Dr. Caucci's Docketing Statement filed with the Pennsylvania Superior Court on September 28, 2005, Dr. Caucci failed to state that Judge Corbett's Order of August 5, 2005 was issued in response to an offer of settlement made by Dr. Caucci's personal counsel on August 3, 2005. Petitioner, Dr. Caucci, never mentioned that fact, which was raised by the Respondents, Mekic, in their Motion to Quash and/or Dismiss and associated filings. This constituted an obvious violation of the Pennsylvania Rules of Appellate Procedure, Rule 3517.

Respondents, Lawrence Mekic and Louise Mekic, subsequently filed an appropriately verified Motion to Quash and/or Dismiss the appeal, on or about October 26, 2005. Petitioner, Dr. Caucci, filed a response, attaching an affidavit of his counsel and the August 23, 2005 letter, which implicitly supported the Mekics' position on the Motion to Quash ("If I do not receive his check, I will call you on Wednesday"). Respondents Mekic filed an Affidavit of Attorney David Fallk, Supplemental Affidavit

of Attorney Michael J. Foley, with attachments, and a Reply Brief of Respondents Mekic in support of the Motion to Quash. The Pennsylvania Superior Court granted the Motion to Quash on December 8, 2005. Petitioner, Dr. Caucci, subsequently filed an Application for Reargument to the Pennsylvania Superior Court on December 22, 2005.[4]

The Pennsylvania Superior Court denied the Application for Reargument on January 3, 2006. On or about February 2, 2006, Dr. Caucci filed the instant Application for Appeal to this Honorable Court.

Petitioner, Dr. Caucci's, Statement of the Case to this Honorable Court plainly misstates the record by asserting that Respondents' counsel agreed to withdraw their claim for attorneys' fees "after a discussion in Chambers months later" (referring to the May 16, 2005 argument, which was the only discussion in Chambers).

In fact, this offer and acceptance came in response to a telephone call from Mr. Griffith to the Honorable Trish Corbett on August 3, 2005, which offer was

---

[4]In his Brief in Opposition to the Motion to Quash (p. 1-2), Dr. Caucci demonstrably misstated to the Pennsylvania Superior Court that Mrs. Caucci wrote her article "in rebuttal to an article published that week by a lawyer who represents Appellee" (referring to Attorney Michael J. Foley) (see Caucci Brief at p. 1-2). Now in this Petition for Allowance of Appeal to this Honorable Court, Petitioner, Dr. Caucci, now claims that Mrs. Caucci was responding to "an article submitted by a Scranton lawyer," Attorney David Fallk. In actuality, Attorney Fallk did not write any article, but had a one-sentence quote contained in an article in the Business Section of *The Scranton Times* which was written by *The Scranton Times* staff writer Jeff Sonderman. Attorney Fallk has no association with the Mekics or with Foley, McLane, Foley, McDonald & MacGregor, P.C. (See Fallk affidavit offered by Respondents in support of the Motion to Quash in the Pennsylvania Superior Court).

accepted on August 4, 2005. Petitioner, Dr. Caucci, took a different position in opposition to the Motion to Quash before the Superior Court, claiming that Judge Corbett ruled on May 16, 2005 that she would not award counsel fees. Both positions of Petitioner, Caucci, are contradicted by a letter written to Attorney Michael J. Foley by Attorney James L. Griffith on August 23, 2005, where Mr. Griffith acknowledges the substance of this August 3, 2005 conversation with Judge Corbett, in a letter to undersigned counsel, "I reported to the Judge that I had spoken to the representative of Dr. Caucci's insurance company. He rejected any request that his company pay counsel fees." Mr. Griffith, counsel for Petitioner, Dr. Caucci, further wrote to undersigned counsel, Michael J. Foley, on August 23, 2005, in pertinent part, that **"if I do not receive his check, I will call you on Wednesday."**

Reasons that Allowance of Appeal Should be Denied

This case presents a straightforward and well settled application of Pennsylvania Rules of Appellate Procedure Rule 302(a), entitled "Requisites for Reviewable Issue," which provides that issues not raised in the lower Court are waived and cannot be raised for the first time on appeal.

Dr. Caucci failed to attempt to modify, rescind or abrogate the August 5, 2005 consent Order before the Court of Common Pleas of Lackawanna County. Since no issue has been preserved for appeal, the Pennsylvania Superior Court properly quashed and dismissed Dr. Caucci's appeal from the August 5, 2005 consent Order.

Any complaint regarding the lack of a record is a direct result of Petitioner's actions in failing to take appropriate steps below to create a record – one of the primary reasons for Pa.R.A.P. Rule 302(a). The burden of preserving an issue and record for appeal is on the Petitioner. Pennsylvania Rules of Appellate Procedure Rule 302(a), entitled "Requisites for Reviewable Issue" provides, in pertinent part:

> (a) General Rule. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.

Id.

It has risen to the level of hornbook law that a party who consents or acquiesces to a judgment or order cannot appeal from that judgment or order without petitioning the lower court to rescind, abrogate or modify the order. Pa.R.A.P. Rule 302(a).

Standard Pa. Practice 2nd, Volume 16, Section 85.114 provides, in pertinent part:

> Ordinarily, a party who consents to or acquiesces in a judgment or order cannot appeal from that judgment or order. (Citing *Pennsylvania Power & Light Co. v. Borough of Shenandoah,* 362 Pa. 43, 66 A.2d 290 (1949); *Brown v. Com. Dept. of Health,* 495 Pa. 456, 434 A.2d 1179 (1981).

Any move to modify or abrogate a consent order must be initiated before the trial court, as required by Pennsylvania Rules of Appellate Procedure Rule 302(a). See, *Sarsfield v. Sarsfield*, 251 Pa. Super. 516, 380 A.2d

899 (1977).

In *Sarsfield v. Sarsfield*, 251 Pa.Super, 516, 380 A.2d 899 (1977), the Pennsylvania Superior Court held that a party could not appeal from a consent decree dropping a former wife's claim for certain support arrearages, directing payment of others, and reaffirming a former husband's obligation to comply with a post-nuptial agreement where the party did not preserve any objections to the consent order before the lower court.

The Pennsylvania Supreme Court decision of *Daly v. The School District of Darby Township,* 434 Pa. 286, 252 A.2d 638, 640 (1969), involved a suit by a taxpayer and parent against elementary schools, seeking to enjoin implementation of a School Board resolution requiring the integration of elementary schools on a ratio of two black pupils to one white period. At an initial hearing before the Chancellor, settlement discussions were initiated before all of the parties. In an off-the-record meeting with the Chancellor, counsel for the School Board offered a proposed settlement, to which counsel for the appellant did not object and, therefore, acquiesced. As a result, the court issued an order denying as moot the appellant's petition for a preliminary injunction and ordered compliance with the new plan that had been formulated by consent.

Subsequently, the appellant parent, on behalf of the minor, hired new counsel and then filed a notice of appeal, challenging the jurisdiction of the court.

With respect to the order of settlement issue, the Pennsylvania Supreme Court ruled that:

> Appellant's first contention is barred by appellant's participation in the October 4

> settlement. Appellant's appeal apparently came as a great surprise to the chancellor, who in his opinion stated that "it was finally agreed (or I thought it was agreed) that the most workable plan would be as follows (the plan and its justification follow) * * *. Our plan did not work. The plaintiff changed lawyers and the new lawyer insists on having the case heard by the Supreme Court. Appellant, of course, cannot agree to a judicial settlement and then claim that because she has new counsel, she may take an appeal from that very agreement. Having made no objection to the chancellor's adjudication implementing the settlement, appellant is now bound by it, since having never objected below to the plan which was finally adopted, appellant cannot raise her objections for the first time on this appeal. See, e.g., *Bechler v. Oliva*, 400 Pa. 299, 161 A.2d 156 (1960); *Brenner v. Sukenik*, 410 Pa. 324, 189 A.2d 246 (1963).

Id. at 289, 252 A.2d at 640.

Petitioner, Dr. Caucci, attempted to appeal to the Pennsylvania Superior Court from the August 5, 2005 Order that he consented to. Petitioner, Dr. Caucci, did not file any pleading with the trial Court seeking to have the August 5, 2005 Order rescinded, modified or abrogated.

This action by Petitioner, Dr. Caucci, of taking an appeal, which was quashed, and now requesting discretionary allowance of appeal from an Order that he consented to, acquiesced in, and initiated, has further

delayed the resolution of the claim below, to the great injury of Lawrence Mekic and Louise Mekic, the Respondents herein. This again has disrupted the orderly administration of justice.

CONCLUSION

Accordingly, for all of the foregoing reasons, Respondents, Lawrence Mekic and Louise Mekic, hereby respectfully request this Honorable Supreme Court to deny the Petition for Allowance of Appeal.

Dated: February 15, 2006

Respectfully submitted,

FOLEY, McLANE, FOLEY,
McDONALD & MacGREGOR, P.C.

By: _____

Michael J. Foley, Esquire
Attorney for Respondents
Lawrence Mekic and
Louise Mekic
Attorney I.D. #39855
600 Linden Street
P.O. Box 1108
Scranton, PA 18501-1108
(570) 342-8194